Supreme Court, U.S.
FILED

(3)

941018 DEC 2 1994

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS A. MASS, pro se and JANET A. MASS,
Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation;
FIELDSTONE/LA COSTA ASSOCIATES LIMITED
PARTNERSHIP, a California Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

APPENDIX VOLUME II

THOMAS A. MASS
Counsel of Record
2851 Torry Court
Carlsbad, CA 92009
Tel: (619) 931-0100
Fax: (619) 438-7850

CHRISTOPHER LIEF MASS
Of Counsel
Pacific Bay Towers
2035 Fourth Street, Suite 107-C
Santa Monica, CA 90405
Tel: (310) 399-3050

50 pp

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS A. MASS, pro se and JANET A. MASS,
Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation;
FIELDSTONE/LA COSTA ASSOCIATES LIMITED
PARTNERSHIP, a California Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

APPENDIX VOLUME II

THOMAS A. MASS
Counsel of Record
2851 Torry Court
Carlsbad, CA 92009
Tel: (619) 931-0100
Fax: (619) 438-7850

CHRISTOPHER LIEF MASS
Of Counsel
Pacific Bay Towers
2035 Fourth Street, Suite 107-C
Santa Monica, CA 90405
Tel: (310) 399-3050

APPENDIX II

Table of Contents

		Page
PART ONE		
Constitutions, Statutes and Ordinances.		1
PART TWO		
Docket Entries for the following courts Trial Court, Court of Appeal, and the California Supreme Court		18
PART THREE		
Lengthy quotations in support of jurisdictional aspects of the federal question involved		39
I.	Inverse Condemnation.	40
II.	Statute of Limitations.	76
III.	Denial Of The Civil Rights Cause Of Action §1983 Including Inverse Condemnation And The Cause Of Action For A Writ Of Mandate Based Thereon	92
IV.	If Proceedings, Decisions And Laws Upon Which They Are Based Are Void For Any Reason, They Are Subject To Being Collaterally Attacked. In Such Cases, The Statute Of Limitations Is Not A Defense, Laches Maybe, Not The Statute Of Limitations As A Bar, Never	122

Page

V. Indemnity, Immunity And Intention 134

VI. Conflicts 142

VII. Facts And Issues 143

VIII. Amended And Supplemental Complaint . . 146

IX. Constitution Of The United States Is The Supreme Law Of The Land 148

PART ONE

CONSTITUTIONS, STATUTES AND CODES

CONSTITUTION FOR THE UNITED STATES

ARTICLE SIX

. . .

This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

. . .

AMENDMENT ARTICLE FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT ARTICLE SEVEN

In suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

AMENDMENT ARTICLE FOURTEENTH

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL STATUTES

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

. . .

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premise of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

---

42 U.S.C. § 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of

persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

---

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

(a) Applicability of statutory and common law.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 and of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing

party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fee

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

CALIFORNIA GOVERNMENT CODE

§ 65091. Notice by mail or delivery

(a)(3) Notice of the hearing shall be mailed or delivered at least 10 days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within 300 feet of the real property that is the subject of the hearing. In lieu of utilizing the assessment roll, the local agency may utilize records of the county assessor or tax collector which contain more recent information than the assessment roll. If the number of owners to whom notice would be mailed or delivered pursuant to this paragraph or paragraph (1) is greater than 1,000, a local agency, in lieu of mailed or delivered notice, may provide notice by placing a display advertisement of at least one eighth page in at least one newspaper of general circulation within the local agency in which the proceeding is conducted at least 10 days prior to the hearing.

(c) In addition to me notice required by this section, a local agency may give notice of the hearing in any other manner it deems necessary or desirable.

---

§ 65351. Opportunities for community involvement; Public hearings

During the preparation or amendment of the general plan, the planning agency shall provide opportunities for the involvement of citizens, public agencies, public utility companies, and civic,

education, and other community groups, through public hearings and any other means the city or county deems appropriate.

---

§ 66451.4 Notice of application to owners within 300 feet

(a) In addition to the notice required by Section 66451.3, whenever approval of a tentative map will constitute a substantial or significant deprivation of the property rights of other landowners, the local agency shall provide notice of the application to all persons, including businesses, corporations, or other public or private entities, shown on the last equalized assessment roll, as owning real property within 300 feet of the property which is the subject of the application.

(b) The notice shall be given by at least one of the following methods:

(1) Direct mailing to the owners.

(2) Posting of notice by the local agency on and off the site in the area where the project is to be located.

(3) Delivery of notice by any means other than mail to the owners.

(4) Any other method reasonably calculated by the local agency to provide actual notice of the hearing.

(c) Nothing contained in this section shall preclude a local agency from providing additional notice by other means, nor shall the requirements of this section preclude the local agency from providing the necessary notice at the same time and in the same manner as public notice otherwise required by law for such project.

(Added by Stats.1980, c. 1154, p. 3808, §1, eff. Sept. 26, 1980.)

---

§ 66451.4. [Added by Stats 1980 ch 1151, §2, ch 1154 §1, effective September 29, 1980, Stats 1982 ch 87 §14, effective March 1, 1982 and repealed by Stats 1984 ch 1009 §§31, 32.]

§ 66458. Approval

(a) The legislative body shall, at the meeting at which it receives the map or, at its next regular meeting after the meeting at which it receives the map, approve the map if it conforms to all the requirements of this chapter and any local subdivision ordinance applicable at the time of approval or conditional approval of the tentative map and any rulings made thereunder. If the map does not conform, the legislative body shall disapprove the map.

(b) If the legislative body does not approve or disapprove the map within the prescribed time, or any authorized extension thereof, and the map conforms to all requirements and rulings, it shall be deemed approved, and the clerk of the legislative body shall certify its approval thereon.

(c) The meeting at which the legislative body receives the map shall be the date on which the clerk of the legislative body receives the map.

---

§ 66473. Disapproval for noncompliance

A local agency shall disapprove a map for failure to meet or perform any of the requirements or conditions imposed by this division or local ordinance enacted pursuant thereto; provided that a final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map; and provided further that such disapproval shall be accompanied by a finding identifying the requirements or conditions which have not been met or performed. Such local ordinance shall include, but need not be limited to, a procedure for waiver of the provisions of this section when the failure of the map is the result of a technical and inadvertent error which, in the determination of the local agency, does not materially affect the validity of the map.

---

§ 66473.5. Required findings

No local agency shall approve a tentative map, or a parcel map for which a tentative map was not required, unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan required by Article 5 (commencing with Section 65300) of Chapter 3 of Division 1, or any specific plan adopted pursuant to Article 8 (commencing with Section 65450) of Chapter 3 of Division 1.

A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan.

---

§ 66474. Denial of approval of map upon certain findings

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.

(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.

(c) That the site is not physically suitable for the type of development.

(d) That the site is not physically suitable for the proposed density of development.

(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

(f) That the design of the subdivision or type of improvements is likely to cause serious public health problems.

(g) That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.

---

§ 66474.1. Approval of final or parcel map complying with previously approved tentative map

A legislative body shall not deny approval of a final or parcel map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final or parcel map is in substantial compliance with the previously approved tentative map.

---

§ 66474.9 Indemnification as condition for map application or approval

(a) Except as provided in subdivision (b), a local agency may not require, as a condition for a tentative, parcel, or final map application or approval, that the subdivider or an agent of the subdivider, defend, indemnify, or hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency as a result of the action or inaction of the local agency, advisory agency, appeal board, or legislative body in reviewing, approving, or denying the map.

(b)(1) A local agency may require, as a condition for a tentative, parcel, or final map application or approval, that the subdivider defend, indemnify, and hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency or its agents, officers, or employees to attack, set aside, void, or annul, an approval of the local agency, advisory agency, appeal board, or legislative body concerning a subdivision, which action is brought within the time period provided for in Section 66499.37. [Remainder of section omitted in printing.]

§ 66499.37. Limitation period

Any action of proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.

CALIFORNIA VEHICLE CODE

§ 21. Uniformity of code

Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein.

CALIFORNIA CIVIL CODE

§ 3482. Acts under statutory authority not a nuisance

WHAT IS NOT DEEMED A NUISANCE. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

(Enacted 1872.)

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 338

(j) An action to recover for physical damage to private property under Section 19 of Article I of the California Constitution.

§ 1094.5

(a) Where the writ is issued for the purpose of inquiring into me validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . .

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

[Balance of section omitted in printing.]

§ 1094.6

(f) In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section.

CARLSBAD MUNICIPAL CODE

§ 1.16.010 Time limits for judicial review.

(a) Judicial review of any decision of the city or of any commission, board, officer, or agent of the city may be had pursuant to Code of Civil Procedure, Section 1094.5, only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section.

(b) Any such petition shall be filed not later than the ninetieth day following the date on which the decision becomes final. If there is no provision for reconsideration of the decision in any applicable provision of any statute, charter, ordinance, or rule, for the purposes of this section, the decision is final on the date it is made. If there is such provision for reconsideration, the decision is final for the purposes of this section upon the expiration of the period during which such reconsideration can be sought; provided, that if reconsideration is sought pursuant to any such provision, the decision is final for the purposes of this section on the date that reconsideration is rejected.

(c) The complete record of the proceedings shall be prepared by the city or its commission, board, officer, or agent which made the decision and shall be delivered to the party requesting such record within ninety days after he has filed a written request therefor. A request for the preparation of the record of the proceedings shall be filed with the person designated in the final decision. Such person shall, within ten days of such request, notify the party of the estimated costs of the preparation of the requested record. The party requesting such record shall, within ten days of such notification, deposit with the person designated in the decision an amount sufficient

to cover the estimated cost. If during the preparation of the record it appears that additional costs will be incurred, the party requesting such record may be notified and, if requested, shall deposit such additional amounts before the record will be completed. If the cost of the preparation of the record exceeds the amount deposited, the party requesting such record shall pay this additional amount. If the amount deposited exceeds the cost, the difference shall be returned to the party requesting such record. Upon receiving the required deposit, the person designated in the decision shall promptly prepare such record in accordance with the request. Such record shall include the transcript of the proceedings; all pleadings; all notices and orders; any proposed decision by a hearing officer; the final decision; all admitted exhibits; all rejected exhibits in the possession of the city or its commission, board, officer, or agent; all written evidence; and any other papers in the case.

(d) If the party files a request for the record as specified in subsection (c) of this section within ten days after the date the decision becomes final as provided in subsection (b) of this section, the time within which a petition pursuant to Code of Civil Procedure, Section 1094.5, may be filed shall be extended to not later than the thirtieth day following the date on which the record is either personally delivered or mailed to the party or his attorney of record, if he has one.

(e) As used in this section, "decision" means any adjudicatory administrative decision made, after hearing, suspending, demoting, or dismissing an officer or employee, revoking or denying an application for a permit or a license, or denying an application for any retirement benefit or allowance.

(f) In making a final decision as defined in subsection (e) of this section, the city shall provide notice to the party that the time within which judicial review must be sought is governed by this section. Upon giving notice of any decision subject to this section, the person responsible to issue such decision shall include in the decision a statement substantially as follows:

> The time within which judicial review of this decision must be sought is governed by Code of Civil Procedure, Section

1094.6, which has been made applicable in the City of Carlsbad by Carlsbad Municipal Code Chapter 1.16. Any petition or other paper seeking judicial review must be filed in the appropriate court not later than the ninetieth day following the date on which this decision becomes final; however, if within ten days after the decision becomes final a request for the record of the proceedings accompanied by the required deposit in an amount sufficient to cover the estimated cost of preparation of such record, the time within which such petition may be filed in court is extended to not later than the thirtieth day following the date on which the record is either personally delivered or mailed to the party, or his attorney of record, if he has one. A written request for the preparation of the record of the proceedings shall be filed with

_____

(name and address of designated person)

As used in this section, "party" means an officer or employee who has been suspended, demoted, or dismissed; a person whose permit or license has been revoked or whose application for a permit or license has been denied; or a person whose application for a retirement benefit or allowance has been denied. (Ord. 1203 § 1, 1977)

CARLSBAD SUBDIVISION ORDINANCE

§20.20.010 Maps to conform to requirements of planning commission or city council.

All final and parcel maps for major subdivisions shall conform to the requirements of the Subdivision Map Act and this title and also shall conform to the requirements specified in the planning commission or city council resolution approving or conditionally approving the tentative map. (Ord. 9602 § 15, 1981; Ord. 9417 § 2 (part), 1975)

§20.20.020 City council to approve maps.

(a) The city council shall not consider a final map unless there is a valid tentative map for the subdivision.

(b) No final map shall be filed in he office of the county recorder until approved by the city council, but such map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map, providing that any such disapproval shall be accompanied by a finding identifying the requirements or conditions which have not been met or performed. The city council may waive any failure of the map to meet such requirements and conditions if such failure is a result of a technical and inadvertent error which, in the determination of the city council, doesn't materially affect the validity of the map.

---

§20.20.040 Grant of open space easement.

In the event that a grant of an open space easement is to be made over any portion of the subdivision, the final map shall contain a certificate signed and acknowledged by those parties having any record title interest in the subdivided land granting such open space easement and stating the conditions of the grant. (Ord. 9417 § 2 (part), 1975)

---

§21.54.060 Notices.

Notice of public hearing shall be given as follows:

. . .

(c) Notice of the hearing shall be mailed or delivered at least ten days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within six hundred feet, or three hundred feet for variance applications, of the real property that is the subject of the hearing. In lieu of utilizing the assessment roll, records of the county assessor or tax collector which contain more recent information than the assessment roll may be used. If the number of owners to whom

notice would be mailed or delivered pursuant to this subparagraph is greater than one thousand in lieu of mailed or delivered notice, the city manager may permit notice to be given by placing a display advertisement of at least one-eighth page in at least two newspapers of general circulation within the city at least ten days prior to the hearing.

---

§21.54.064 Applicant's responsibilities.

(a) The applicant for any action requiring a noticed public hearing shall provide the city with a list of persons or entities to whom notice must be given and the addresses of such persons. The applicant shall also provide stamped, addressed envelopes for mailing notice. The list and the envelopes, if required, shall be provided to the city not more than forty-five nor less than thirty days prior to the time the matter is scheduled for hearing. If the number of persons to whom notice would be mailed exceeds one thousand the applicant may, in lieu of providing the stamped, addressed envelopes, provide an appropriate display advertisement. The applicant shall verify the accuracy of the list and the addresses. The secretary of the planning commission or the city clerk shall be responsible for informing the applicant of the date a matter is scheduled for hearing.

(b) The applicant shall pay the cost of providing the notice required by this chapter. (Ord. 9758 § 19, 1985)

---

§21.54.120 General plan amendments.

All provisions of this chapter applicable to the amendment of zone classifications shall also apply to amendments to the general plan or to any of the elements thereof.

If the hearings for general plan amendments are held at the same time as hearings for zone amendments under Chapter 21.52, the notice of such hearings may be combined with those required for general plan amendments under this section. (Ord. NS-44 § 2, 1988; Ord. 9379 § 2, 1974)

PART TWO

COURT DOCKET ENTRIES

CHRONOLOGICAL INDEX TO JOINT APPENDIX IN LIEU OF CLERK'S TRANSCRIPT

	VOL.	PAGE
COMPLAINT FOR INVERSE CONDEMNATION AND NUISANCE REQUESTING DECLARATORY RELIEF AND IN THE ALTERNATIVE A WRIT OF MANDATE, ALL CAUSES ARE CLASS ACTIONS, FILED 10/18/91.	1	1
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' DEMURRER AND NOTICE OF HEARING ON DEMURRER TO COMPLAINT OF "THOMAS A. MASS, JANET A. MASS, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED", FILED 12/2/91.	1	44
CITY OF CARLSBAD'S AND FIELD-STONE/LA COSTA'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF COMPLAINT OF "THOMAS A. MASS, JANET A. MASS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED," FILED 12/2/91.	1	47
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND MOTION TO STRIKE BY THE CITY OF CARLSBAD AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED, FILED 12/2/91.	1	51

	VOL.	PAGE
NOTICE OF LODGMENT IN SUPPORT OF CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S DEMURRER AND MOTION TO STRIKE, FILED 12/2/91.	1	73
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE AND IN SUPPORT OF PLAINTIFFS' COMPLAINT, FILED 1/8/92.	1	75
NOTICE OF LODGMENT IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES OBJECTING TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE PORTIONS OF PLAINTIFFS' COMPLAINT (INCLUDING AS AN EXHIBIT A COPY OF PLAINTIFFS' PROPOSED SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES), FILED 1/8/92.	1	99
SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIESIN OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE AND IN SUPPORT OF PLAINTIFFS' COMPLAINT, LODGED WITH CLERK OF COURT 1/8/92.	1	102

	VOL.	PAGE
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND MOTION TO STRIKE, FILED 1/17/92.	1	123
MINUTES/ORDER OF THE COURT, HEARING DATE - 3/17/92	1	133
MINUTES/ORDER OF THE COURT, HEARING DATE - 3/27/92.	1	134
NOTICE OF RULING ON DEMURRER AND MOTION TO STRIKE FILED BY CITY OF CARLSBAD AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, FILED 4/1/92.	1	135
FIRST AMENDED COMPLAINT FOR INVERSE CONDEMNATION AND NUISANCE REQUESTING DECLARATORY RELIEF AND IN THE ALTERNATIVE A WRIT OF MANDATE, ALL CAUSES ARE CLASS ACTIONS, FILED 4/1/92.	1	137
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' DEMURRER AND NOTICE OF HEARING ON DEMURRER TO FIRST AMENDED COMPLAINT OF "THOMAS A. MASS, JANET A. MASS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED," FILED 4/16/92.	1	185

	VOL.	PAGE
CITY OF CARLSBAD'S AND FIELDSTONE/ LA COSTA'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF FIRST AMENDED COMPLAINT OF "THOMAS A. MASS, JANET A. MASS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED," FILED 4/16/92.	1	188
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND MOTION TO STRIKE BY THE CITY OF CARLSBAD AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED, FILED 4/16/92.	1	192
NOTICE OF LODGMENT IN SUPPORT OF CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S DEMURRER AND MOTION TO STRIKE, FILED 4/16/92.	1	211
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT, FILED 5/4/92.	1	213
NOTICE OF LODGMENT IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT, FILED 5/4/92.	2	235

	VOL.	PAGE
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER AND MOTION TO STRIKE, FILED 5/8/92.	2	238
MINUTES/ORDER OF THE COURT, HEARING DATE - 5/12/92.	2	248
MINUTES/ORDER OF THE COURT, HEARING DATE - 5/22/92.	2	249
SECOND AMENDED COMPLAINT FOR INVERSE CONDEMNATION, NUISANCE AND/OR NEGLIGENCE, REQUESTING DECLARATORY RELIEF, AND IN THE ALTERNATIVE A WRIT OF MANDATE, FILED 5/22/92.	2	250
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' DEMURRER TO AND NOTICE OF HEARING ON DEMURRER AND TO SECOND AMENDED COMPLAINT OF THOMAS A. MASS AND JANET A. MASS, FILED 6/15/92.	2	301
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF SECOND AMENDED COMPLAINT, FILED 6/15/92.	2	304

	VOL.	PAGE
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' LIMITED PARTNERSHIP'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR DEMURRER TO AND MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT, FILED 6/15/92.	2	308
NOTICE OF LODGMENT IN SUPPORT OF CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S DEMURRER TO AND MOTION TO STRIKE PORTIONS OF SECOND AMENDED COMPLAINT, FILED 6/15/92.	2	327
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT, FILED 7/20/92.	2	329
NOTICE OF LODGMENT IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT (WITH EXHIBIT T - MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER AND MOTION TO STRIKE PLAINTIFFS' SECOND AMENDED COMPLAINT), RECEIVED 7/20/92	2	362

	VOL.	PAGE
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' LIMITED PARTNERSHIP'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR DEMURRER TO AND MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT, FILED 7/23/92.	2	381
MINUTES/ORDER OF THE COURT, HEARING DATE - 7/27/92.	2	391
MINUTES/ORDER OF THE COURT, HEARING DATE - 8/7/92.	2	392
THIRD AMENDED COMPLAINT FOR PLAINTIFFS' THIRD CAUSE OF ACTION FOR A WRIT OF MANDATE IN THE ALTERNATIVE, FILED 8/6/92.	2	393
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' DEMURRER TO AND NOTICE OF HEARING ON DEMURRER TO THIRD AMENDED COMPLAINT OF THOMAS A. MASS AND JANET A. MASS, FILED 9/3/92.	2	438
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF THIRD AMENDED COMPLAINT AND ALL OF PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 9/3/92.	2	441

	VOL.	PAGE
NOTICE OF REQUEST FOR SANCTIONS, FILED 9/3/92.	2	445
CITY OF CARLSBAD'S AND FIELDSTONE LA COSTA ASSOCIATES' LIMITED PARTNERSHIP'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR DEMURRER TO AND MOTION TO STRIKE PORTIONS OF THE THIRD AMENDED COMPLAINT AND MOTION TO STRIKE ALL OF THE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 9/3/92.	2	447
DECLARATION OF RICHARD A. SCHULMAN IN SUPPORT OF CITY OF CARLSBAD'S AND FIELDSTONE/ LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S REQUEST FOR SANCTIONS, FILED 9/3/92.	3	467
NOTICE OF LODGMENT IN SUPPORT OF CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S DEMURRER TO AND MOTION TO STRIKE, FILED 9/3/92.	3	469
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER TO AND MOTION TO STRIKE PORTIONS OF PLAINTIFFS' THIRD AMENDED COMPLAINT AND MOTION TO STRIKE ALL OF THE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 10/8/92.	3	471

	VOL.	PAGE
DECLARATION OF THOMAS A. MASS IN OPPOSITION TO DEFENDANTS' MOTION FOR AWARD OF EXPENSES, COSTS AND ATTORNEY'S FEES AS SANCTIONS, FILED 10/8/92.	3	494
NOTICE OF LODGMENT IN SUPPORT OF PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER TO AND MOTION TO STRIKE PORTIONS OF PLAINTIFFS' THIRD AMENDED COMPLAINT AND MOTION TO STRIKE ALL OF THE AMENDED AND SUPPLEMENTAL COMPLAINT (WITH ATTACHMENTS: CARLSBAD CITY ORDINANCE §1.116.010; §1.16.020; PLAINTIFFS' CHART OF RULINGS ON DEMURRERS WITH ORDERS ATTACHED), FILED 10/8/92.	3	498
CITY OF CARLSBAD'S AND FIELD-STONE/LA COSTA ASSOCIATES' LIMITED PARTNERSHIP'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR DEMURRER TO AND MOTION TO STRIKE PORTIONS OF THE THIRD AMENDED COMPLAINT AND MOTION TO STRIKE ALL OF THE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 10/13/92.	3	510

	VOL.	PAGE
SUPPLEMENTAL DECLARATION OF RICHARD A. SCHULMAN IN SUPPORT OF CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S REQUEST FOR SANCTIONS, DATED 10/13/92.	3	520
SUPPLEMENTAL NOTICE OF LODGMENT IN SUPPORT OF CITY OF CARLSBAD'S AND FIELDSTONE/ LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S DEMURRER TO AND MOTION TO STRIKE, FILED 10/13/92.	3	522
MINUTES/ORDER OF THE COURT - HEARING DATE - 10/15/92.	3	524
MINUTES/ORDER OF THE COURT - HEARING DATE - 10/23/92.	3	525
NOTICE OF RULING ON DEMURRER AND MOTION TO STRIKE FILED BY DEFENDANTS CITY OF CARLSBAD AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, DIRECTED TOWARD PLAINTIFFS' THIRD AMENDED COMPLAINT AND AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 10/27/92.	3	526
NOTICE OF MOTION AND MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL, FILED 10/28/92.	3	528

	VOL.	PAGE
NOTICE OF MOTION AND MOTION FOR ORDER GRANTING LEAVE TO FILE PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 10/28/92.	3	530
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL AND MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 10/28/92.	3	532
NOTICE OF LODGMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 10/28/92.	3	540
AMENDED AND SUPPLEMENTAL COMPLAINT FOR PLAINTIFFS' CAUSE OF ACTIONS BASED ON THE DEPRIVATION OF THEIR RIGHTS SECURED BY THE UNITED STATES CONSTITUTION, REQUESTING MONEY DAMAGES, DECLARATORY RELIEF AND EQUITABLE RELIEF INCLUDING AN INJUNCTION, FILED 8/31/92, LODGED 10/28/92.	3	542
DECLARATION OF THOMAS A. MASS IN SUPPORT OF MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL AND MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 10/28/92.	3	577

	VOL.	PAGE
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP'S EX PARTE APPLICATION FOR APPROVAL OF ORDER SUSTAINING DEMURRER WITHOUT LEAVE AND DISMISSING ACTION, FILED 11/5/92.	3	579
DECLARATION OF RICHARD A. SCHULMAN IN SUPPORT OF EX PARTE APPLICATION OF CITY OF CARLSBAD AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP FOR APPROVAL OF ORDER SUSTAINING DEMURRER WITHOUT LEAVE AND DISMISSING ACTION, FILED 11/5/92.	3	583
ORDER GRANTING DEMURRER FILED BY DEFENDANTS CITY OF CARLSBAD AND FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP WITHOUT LEAVE TO AMEND, WITH ORDER DISMISSING ACTION [CCP §472d, §581(f)(1), §581d] DISPOSES OF ENTIRE CASE AS TO ALL PARTIES, FILED 11/5/92.	3	586
CITY OF CARLSBAD'S AND FIELDSTONE/LA COSTA ASSOCIATES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL AND MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 11/20/92.	3	590

	VOL.	PAGE
DEFENDANTS' OBJECTIONS TO EVIDENCE OFFERED IN SUPPORT OF MOTION TO SET ASIDE AND VACATE RULING AND MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 11/20/92.	3	607
DECLARATION OF RICHARD A. SCHULMAN IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL AND MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 11/20/92.	3	609
NOTICE OF LODGMENT (WITH REQUEST FOR JUDICIAL NOTICE) IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE RULING AND MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, RECEIVED 11/20/92.	3	611
THOMAS A. MASS'S AND JANET A. MASS'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL AND MOTION FOR ORDER GRANTING LEAVE TO FILE PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 11/25/92.	3	614

	VOL.	PAGE
NOTICE OF LODGMENT (WITH ATTACHMENTS: PLAINTIFFS' CHART OF RULINGS ON DEMURRERS WITH ORDERS ATTACHED), FILED 11/25/92.	3	629
MINUTES/ORDER OF THE COURT, HEARING DATE - 12/2/92.	3	641
JUDGMENT, FILED 11/30/92, ENTERED 12/2/92, JUDGMENT BOOK 2237, PAGE 249.	3	642
NOTICE OF RULING ON PLAINTIFFS' MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL AND MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 12/8/92.	3	644
ORDER DENYING MOTION TO SET ASIDE AND VACATE RULING OF DISMISSAL AND DENYING MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT, FILED 12/14/92.	3	646
NOTICE OF ENTRY OF JUDGMENT, FILED 12/16/92.	3	648
MEMORANDUM OF COSTS (SUMMARY), FILED 12/16/92.	3	650
NOTICE OF APPEAL COMBINED WITH NOTICE OF ELECTION TO PROCEED UNDER CALIFORNIA RULES OF COURT, RULE 5.1, FILED 1/4/93.	3	651

	VOL.	PAGE
STIPULATION RE JOINT APPENDIX IN LIEU OF CLERK'S TRANSCRIPT PER CALIFORNIA RULE OF COURT 5.1(b), DATED JANUARY 23, 1993.	3	654

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FOURTH APPELLATE DISTRICT
DIVISION: 1

Case No. D018305

TITLE

Mass, Thomas A.
v.
City of Carlsbad

SUPERIOR COURT INFORMATION

County: SAN DIEGO CIVO
Superior Court No.: N53303
Superior Court Judge: Murphy
Notice of Appeal Date: January 4, 1993

ATTORNEYS - LITIGANTS

Mass, Thomas A.
2851 Torry Court
Carlsbad, CA. 92009

Mass, Thomas A. PLAINTIFF-APPELLANT
Mass, Janet A.
2851 Torry Court
Carlsbad, CA. 92009

Mass, Janet A. PLAINTIFF-APPELLANT

Mc Donald, Hecht & Solberg
Schulman, Richard A. 619-239-3444
600 W. Broadway, 8th Fl.
San Diego, CA. 92101

Fieldstone Company DEFENDANT-RESPONDENT

Office of City Attorney
Biondo Jr., Vincent F. 619-434-2891
1200 Carlsbad Village Dr.
Carlsbad, CA. 92008

City of Carlsbad DEFENDANT-RESPONDENT

DOCKET ENTRIES

1 January 28, 1993
Notice of Appeal Lodged/Received.
Filed January 4, 1993 By Thomas and Janet Mass

2 January 28, 1993
Notice Per Rule S 1 - With Reporter'S Transcript.

3 January 28,1993
Appellate Package Sent

4 January 28, 1993
Docketing Statement Filed

5 March 9, 1993
70 Day Letter Sent (Rule 5.1).
70 Day Date Is March 14, 1993

6 March 15, 1993
Joint Appendix Filed.
3 Volumes of Joint Appendix

7 March 15, 1993
Appellant's Opening Brief Filed

8 April 13, 1993
Respondents Brief Filed.
As To Both Respondents

9 April 13, 1993
****** To Be Assigned ******

10 May 3, 1993
Appellant'S Reply Brief Filed.
B L C - Local Rule 8 - End Notes In Brief

11 May 4, 1993
Case Fully Briefed.

12 May 4, 1993
Oral Argument Waiver Notice Sent.
May 14th

13 May 14, 1993
Request For Oral Argument Filed By:
Appellant - 15 Min

14 May 17, 1993
Request For Oral Argument Filed By:
Respondent - 10 Min (City of Carlsbad)

15 March 29, 1994
Change of Address Filed For:
Counsel For Appellants

16 April 4, 1994
On June Calendar.

17 April 4, 1994
Work, J.
W T N

18 April 28, 1994
Calendar Notice Sent. Calendar Date:
Wednesday, June 8, lg94 @ 1:30 p.m.
W T N

19 May 3, 1994
Received Letter From:
Firm of Mc Donald, Hecht & Solberg - Richard A.
Schulman of the Firm Handling Appeal

20 June 8, 1994
Cause Argued and Submitted.
W T N

21 June 13, 1994
Change of Address Filed For:
Thomas and Janet Mass

22 June 17, 1994
Opinion Filed.
We Affirm the Judgment, Except We Reverse the
Court'S Grant of the Demurrer To That Part of

23 June 17, 1994
Previous Entry Continued.
The Second Cause of Action Which Alleges A
Continuing and Temporary Nuisance Against

24 June 17, 1994
Previous Entry Continued.
Fieldstone During the Construction Phase of the
Development, and We Remand This Matter For

25 June 17, 1994
Previous Entry Continued.
Further Proceedings Consistent With This Opinion.
The Parties To Bear Their Own Costs of Appeal.

26 June 17, 1994
Previous Entry Continued.
Work, Acting P. J., Todd, J., Nares, J.

27 July 1, 1994
Rehearing Petition Filed.
By Appellants

28 July 6, 1994
Order Denying Rehearing Petition Filed.

29 July 6, 1994
Answer To Rehearing Petition Filed.
(moot)

30 July 27, 1994
Record Transmitted To Supreme Court.
1 Volume

31 July 28, 1994
Copy of Petition For Review Received

32 August 8, 1994
Answer To Petition For Review Received

33 August 17, 199A
Telephone Conversation With
Supreme Court - Jurisdiction Date Is Sept. 23, '94

34 August 18, 1994
Received Copy of
Reply To Answer To Petition For Review

35 September 7, 1994
Petition For Review Denied In Supreme Court.
Appellants Petition For Review Denied.
Order File Din This Court Onseptember 9, 1994

36 September 15, 1994
Record Returned From Supreme Court.

37 September 26, 1994
Remittitur Issued.

CASE DISPOSITION INFORMATION

Disposition Date: June 17, 1994
Disposition: Affirmed/Part, Rev/Part, Remanded W/ Direction
Opinion Type: Sign Npub
Disposition Final: (Y = Yes - Blank = No) Y
Notation: Work, Acting P. J., Todd, J., Nares, J.

JUDGES PANEL INFORMATION

Judge Name: Work, Don (J)
Role: Active

Judge Name: Todd, William L. (J)
Role: P
Voted: C

Judge Name: Nares, Gilbert (J)
Role: P
Voted: C

CASE NOTE INFORMATION

NOTES: /
F-6

FINANCIAL TRANSACTION INFORMATION

1 Receipt No:R405521
Void: Fee Type: F Filing Date: January 4, 1993
Attorney Sequence No: 1 Fee Status: A
Pay/Waive Date: January 28, 1993
Debit Amount: .00 Credit Amount250.00
Pay Type: K Check No: 16-66/1220
NOTE:

END OF DOCKET CARD INFORMATION
FOR CASE NUMBER D018305

SUPREME COURT OF THE STATE OF CALIFORNIA

ABSTRACT OF COURT DOCKET

July 26, 1994
Petition for Review Filed

August 8, 1994
Answer to Petition for Review Filed

August 15, 1994
Reply to Answer to Petition for Review Filed

September 7, 1994
In Bank - Appellants' Petition for Review Denied, Justice Mosk, Acting Chief Justice

PART THREE

LENGTHY QUOTATIONS IN SUPPORT OF JURISDICTIONAL ASPECTS OF THE FEDERAL QUESTION INVOLVED

I. Inverse Condemnation

II. Statute of Limitations

III. Denial Of The Civil Rights Cause Of Action §1983 Including Inverse Condemnation And The Cause Of Action For A Writ Of Mandate Based Thereon

IV. If Proceedings, Decisions And Laws Upon Which They Are Based Are Void For Any Reason, They Are Subject To Being Collaterally Attacked. In Such Cases, The Statute Of Limitations Is Not A Defense, Laches Maybe, Not The Statute Of Limitations As A Bar, Never

V. Indemnity, Immunity And Intention

VI. Conflicts

VII. Facts And Issues

VIII. Amended And Supplemental Complaint

IX. Constitution Of The United States Is The Supreme Law Of The Land

I. INVERSE CONDEMNATION

APPELLANTS' OPENING BRIEF

At pages 2-26:

III. DISCUSSION

A. THE TRIAL COURT ERRONEOUSLY SUSTAINED DEFENDANTS' DEMURRER TO PLAINTIFFS' FIRST CAUSE OF ACTION FOR INVERSE CONDEMNATION AND ABUSED ITS DISCRETION IN NOT ALLOWING PLAINTIFFS LEAVE TO FILE ONE AMENDMENT AFTER BASING ITS RULING ON THE BAR OF THE STATUTE OF LIMITATIONS, BOTH OF WHICH ERRORS WERE PREJUDICIAL.

1. THE COURT'S RULING (J.A. 391) THAT "PLAINTIFFS HAVE FAILED TO PLEAD FACTS GIVING RISE TO A CLAIM FOR INVERSE CONDEMNATION" IGNORES OR MISREADS THE ADMITTED ALLEGATIONS OF FACT STATING THAT PRIVATE PROPERTY WAS FOR PUBLIC PURPOSES SUBJECTED TO THE IMPOSITION BY THE CITY OF AN INVASIVE SERVITUDE PERMITTING CONCENTRATIONS OF NOISE AND POLLUTED AIR TO RENDER PLAINTIFFS' HOME UNTENANTABLE.

The United States Constitution, Amendment V, provides, "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." The California Constitution, Article I, §19 provides, "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." The basic issues under these provisions involve three questions: has private property been "taken" or "damaged;" was it for a public use; and what is the value of the property so "taken" or "damaged" so as to provide the owner "fair compensation?" The constitutional policy is that injuries caused by public improvements should be spread throughout

the community rather than becoming a burden on the individual. It should be noted that the California Constitution requires compensation not only for "taking" of property, but also for the "damages to property.

In general, the governmental activities which can interfere with or damage property interest are divided into two broad categories: those which are actually physical "taking", including constructive physical invasion or interference with property rights (nuisance-trespass, e.g., low-flying aircraft); and those which cause damage by excessive or improper restriction on property interest by regulations that go "too far" (e.g., economic effect).

California cases have placed less emphasis on the technical aspect of the source of the invasion or interference of property and more emphasis on the nature and extent of the actual harm suffered by the particular plaintiffs relating to their loss of the use and enjoyment of their property and its diminution of value.

The appellants have alleged in all of their complaints by well pleaded facts, all of the essential allegations necessary to state a good cause of action against the respondent-City for inverse condemnation. The complaints make clear that there has been a constructive physical "taking" or "damage" to appellants' protectible property interest. That this "taking" or "damage" was the result of the respondent-City's activity, which was for a public use and purpose, which caused the physical invasion or interference with appellants' property rights.

The test to determine if the physical "damage" or "taking," constructive or actual, has been alleged, may from the cases herein identified be fairly summarized as follows:

(a) substantial impairment or interference with the use and enjoyment of appellants' property and a diminution in its value; or

(b) substantial interference with appellants' use and enjoyment OR a direct, peculiar and substantial burden on their property and an impairment of its value.

The general rule announced in Holtz v. Superior Court of San Francisco, 3 Cal.3d 296, 303, 304 (1970) is that a property owner may recover damages in an inverse condemnation case

where the physical damage is caused to his or her property by public improvements as deliberately planned and built, without proof of negligence, and whether or not such damage is foreseeable. There are two exceptions to the Holtz rule of absolute liability: "emergency use of police power" and a common law "right to inflict damages." Neither of these exceptions are applicable to the case at bar.

In Varjabedian v. City of Madera, 20 Cal.3d 285 (1977) the Supreme Court states with respect to odorous air pollution in connection with inverse condemnation damages said, at p. 294:

> "[I]f the premises were uninhabitable and hence saleable only to an absentee farmer, it appears this factor would appropriately be considered by a prospective purchaser and could properly be included in the estimated decline in market value."

Similarly, a willing and informed buyer would be keenly aware of damage to market value brought about by the impact of the invasive noise, dirt, and noxious air due to the City's change of gate location.

In Varjabedian the trial judge had given as his reason for denying just compensation the plaintiffs' failure to allege "physical damage to the property" or a "trespass". In assessing whether the plaintiffs' allegations served as a basis for inverse liability the Court, at pp. 296-297 (citing more than 15 separate authorities) used the following language which we set forth with citations eliminated:

> "In assessing whether plaintiffs' allegations may serve as a basis for inverse liability, we note that physical damage to property is not invariably a prerequisite to compensation. Rather the determination of the scope of the just compensation clause rests on its construction "as a matter of interpretation and policy". The contending policies which guide that construction have often been described as follows: "on the one hand the policy

underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements...On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."

"Several factors present militate in favor of a distribution throughout the relevant community of the type of loss involved here. Plaintiffs' claim stems from the recurring violation of their property by a gaseous effluent. As such, the injury is not far removed from those core cases of direct physical invasion which indisputably require compensation. Thus damage from invasions of water or other liquid effluents often provides the basis for inverse liability. Moreover, plaintiffs' complaint which includes, inter alia, the claim that their land was made "untenantable for residential purposes" is clearly sufficient to depict a permanent and "substantial impairment" in their use of the land."

Of particular significance is the recent case of Harding v. State of California Ex Rel. D.O.T., 159 Cal.App.3d 359 (1984). This Court dealt with the unique damages involved in a situation similar to the facts in the case at bar. In this case the Court of Appeal affirmed the judgment dismissing the nuisance cause of action against the City but reversed the summary judgment as to the cause of action for inverse condemnation. The Court held that the owners alleged unique damage to their property from the noise, dirt, dust, and debris, caused by the construction of a highway, and that therefore they should have been allowed to establish that they suffered a peculiar and substantial burden as a result of their proximity to the highway. On page 367 the Court concluded as follows:

> "Thus, California Courts have extended the peculiar and substantial burden standard to airport noise cases and noxious odor cases. Both these classes of cases at one time required physical taking before compensation was allowed. People suffering damages from their proximity to a highway should not be unequally required to allege and prove a physical invasion." [Citations omitted.]

At page 364 the court states:

> "No taking is required, rather, an action for inverse condemnation requires and invasion of property which directly, substantially, and peculiarly burdens plaintiff to his detriment. (Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 119-120 [109 Cal.Rptr. 799, 514 P.2d 111].)"

The court pointed out at page 365:

> "Plaintiffs' complaint stated that the prevailing winds collect all of the flotsam of the freeway and deposit it on plaintiffs' property, this being the first open area along the easterly side of the embankment, and that plaintiffs are subjected to dirt, dust, debris and noise, and have lost their access to air, light and view, all making their property virtually untenable. (sic.)"

After reviewing City of Yakima v. Dahlin (1971) 5 Wn.App. 129 [485 P.2d 628], the court stated at page 366:

> "The court found that even though there was no appropriation of property, construction of the overpass would create an echo chamber that would elevate noise levels on Dahlin's property to an intolerable degree."

In the Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc. (imposition of a servitude together with construction), 77 Cal.App.3d 742 (1978), the Court, after reviewing the policy consideration on which inverse condemnation rests and what damages are not contemplated by the Constitution, states on page 756: "But where there has been a substantial impairment of the use which diminishes the market value of the property, compensation is constitutionally compelled." [Citations omitted.]

In Barnhouse v. City of Pinole (damage caused by the construction of a drainage system), 133 Cal.App.3d 171 (1982) the Court at page 197 states the following:

> "With regard to what a plaintiff must show in such a suit, the California Supreme Court has made the following comments: 'The right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation under this provision.'" [Citations omitted.]

The case of Smart v. City of Los Angeles (air craft noise), 112 Cal.App.3d 232 (1980), held that:

> "Plaintiff, although of course entitled to only one recovery, is entitled to several 'bites off the apple' and may proceed with various legal theories in his attempt to prove the City's liability for his damages. Likewise, damages recoverable by a plaintiff in a successful nuisance action for injuries to real property include diminution of the land's value as well as damages for annoyance, inconvenience and discomfort." [pages 239-240] [Citations omitted]

The Court also stated that in inverse condemnation, each action must be examined on its own to determine what results

"justice and fairness" requires; and this is done by focusing on the actual impact of the governmental activity upon the property owner's actual use to determine a taking [citations omitted] [pages 238-239].

Smith v. County of Los Angeles (construction of road caused landslide), 214 Cal.App.3d 266 (1989), is authority for alleging a cause of action for nuisance and inverse condemnation based on the same facts and that damages should include plaintiffs' costs and that the Holtz exception has an extremely limited application.

In Aaron v. City of Los Angeles (1974) 40 C.A.3d. 471; 115 Cal.Rptr. 161, the plaintiffs' evidence proved a measurable reduction in the market values of their homes when noise from aircraft using the City airport caused substantial interference with the use and enjoyment of their property. The Court in commenting upon a landmark United States Supreme Court case, United States v. Causby (1946) 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, said at 477:

> "Although the flights did not completely destroy the enjoyment and use of the land, they were held to be so low and frequent as to constitute a direct and immediate interference with the full enjoyment of the land, limiting the utility of the land and causing a diminution in its value, and therefore constituted a taking under the Fifth Amendment."

The Aaron Court then continued:

> "In Martin the court held that where the flights in question caused such interference with the use and enjoyment of the property as to result in a measurable diminishment in market value, the government and not the individual homeowner should be required to bear that burden."

When the federal or state governments actually physically take private property and fail to provide the owner with just

compensation, the Courts historically have always provided the owner a remedy. That body of law has not changed but has been extended to apply to a taking that is only a discreet part of the whole even if only temporary, and further, has extended recovery to include cases of "effective" physical appropriation, occupation, invasion of or interference, including air pollution, and thus constitutes a constructive "taking." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser-Aetna v. U.S., 444 U.S. 164 (1979); First English Evangelical Lutheran Church, 107 S.Ct. 2378 (1987); Nollan v. California Coastal Commission 483 U.S. 825 (1987); U.S. v. Causby, 328 U.S. 256 (1946).

The Harding case, infra, set forth the requirements for a cause of action at page 367.

The allegations in Plaintiffs' complaint as summarized in the above Summary Of Material Facts state a cause of action under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 19 of the California Constitution.[2]

No regulatory taking such as is involved in zoning ordinances restricting the use of land is involved in the case now before the Court.

---

[2]It seems advisable to emphasize that plaintiffs' claim for just compensation is made pursuant to rights guaranteed under the Fifth Amendment to the United States Constitution and also rights afforded by Article I, Section 19 of the California Constitution. These two distinct grants of rights differ in wording and at times in the interpretations they receive by the respective highest Courts finally responsible for their judicial construction. As to any such conflicting differences, we have in mind that Article VI of the U.S. Constitution reads: "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The supremacy of the federal Constitution is acknowledged and confirmed by the California Constitution in Article III §1.

The language of the Constitutions prohibits the taking of private property for public use without payment of just compensation. The moment private property has been taken whether by formal condemnation proceedings, by physical invasion, regulation or occupancy -- the landowner has suffered a constitutional violation if compensation is not paid.

2. THE COURT'S HOLDING (J.A. 391) THAT PLAINTIFFS FAILED TO ALLEGE FACTS SHOWING THE LOSS OF THE PRIMARY USE AND VALUE OF THEIR PROPERTY WAS PATENTLY ERRONEOUS. IN ADDITION TO OTHER ALLEGATIONS THE PLAINTIFFS ALLEGED THAT THEIR HOME WAS RENDERED UNTENANTABLE.

The court erroneously assumes that this is a regulatory "taking" case. Between the respondents it is. However, out of these proceedings "The City" effected a physical "taking" of the plaintiffs' property. Accepting arguendo that the "taking" of plaintiffs' property was effected by a regulation it still could pass that test and be a compensable "taking."

The articulated guiding principles underlying the courts' "taking" doctrine has been consistent and deceptively simple. The Court has repeatedly stated that the ultimate issue in a "taking" case is whether "fairness and justice" require that compensation be paid for economic injuries caused by the government. Pennsylvania Central Transport Co. v. New York City, 438 U.S. 104, 124 (1978) (Penn. Central).

The court has formulated a series of tests to determine whether considerations of "fairness and justice" require that compensation be paid. These tests are used to provide a structure to review the particular facts of the regulatory "taking" to determine if there has been a compensable "taking" of a protected "property" right or rights. This doctrine requires the court to apply one of three major tests to determine whether governmental action other than a formal exercise of eminent domain power constitutes a taking: the three-factor Penn Central case; the two-part Agins test; and the Loretto per se rule.

Between 1980 and 1987 in a number of taking cases that followed Agins, the court used a one factor test for a land use

regulation that effects a taking on its face and that factor was whether the law "denies the owner economically viable use of his land . . .". The use of the "denial of economically viable use" test as the sole test was short lived. In 1987 the Keystone case "revived" the two-part Agins test.

The use of the single factor test that the trial court used, would result in doing away with the concept of providing compensation for regulatory taking, and even physical taking, unless the claimant alleged loss of all use and value. The trial court with the use of this test would have even denied the Nollans recovery because they could not show the loss of their primary value and use by virtue of public lateral access between their sea wall and the high tide line. In effect, the use of the one factor test, would result in the California Courts returning to their pre-1978 holdings that the owner's remedy was to declare the regulation invalid and not permitting an action for "just compensation," a result prohibited by our Constitutions.

In addition, it was erroneous for the court to rule that it has not been pled that plaintiffs lost the primary use and value of their property when those actual words were used in the second amended complaint and supported by the facts alleged in the first cause of action (J.A. 256: 11-24) (J.A. 253: 14-18) (J.A. 255: 9,10) (J.A. 258: 5-9; 21-23).

3. THE COURT'S RULING (J.A. 391) THAT A TEMPORARY INJURY RESULTING FROM ACTUAL CONSTRUCTION OF PUBLIC IMPROVEMENTS "IS GENERALLY NON-COMPENSABLE" IS NOT APPLICABLE TO THE FACTS ALLEGED IN PLAINTIFFS' COMPLAINT.

Referring to plaintiffs' first cause of action in the second amended complaint, the court ruled (J.A. 391) "A temporary injury resulting from actual construction of public improvements is generally noncompensable" [Citing, People ex rel. Department of Public Works v. Ayon (1960) 54 Cal.2d 217, 228].

In reviewing the allegations contained in the complaint and cause of action referenced, we have found not one allegation

asserting a temporary injury resulting from the public improvements referred to in the court's ruling.

It is true that at page 228 of the opinion in the Ayon case the court clearly states that "Temporary injury resulting from actual construction of public improvements is generally noncompensable." However, on the same page the court points out "It is true that damages resulting from unnecessary and substantial temporary interference with the property owner's rights in the property may be compensable."

Regardless of this quoted language there is no issue raised in the first cause of action which has to do with this question.

The "taking" which results from "The City's" traffic management plan to divert traffic was not even considered by the respondents or the lower court. It must be patently apparent that the injuries caused by the traffic diversion plan will be continuing and permanent (J.A. 265).

In any event, in light of the First English Evangelical Lutheran Church v. County of Los Angeles (107 S.Ct. 2378, 482 U.S. 304 (1978)) holding that even a temporary taking must be compensable, the Ayon case is suspect and must be reexamined.

4. THE TRIAL COURT ERRONEOUSLY SUSTAINED THE DEFENDANTS' DEMURRER TO PLAINTIFFS' FIRST CAUSE OF ACTION FOR INVERSE CONDEMNATION BY IMPROPERLY AND PREJUDICIALLY SPECULATING WHAT STATUTE OF LIMITATION APPLIED AND WHEN THE CAUSE ACCRUED.

(a) The trial court erroneously sustained the defendants' general demurrer by failing to apply the correct standard of judicial review to test the sufficiency of plaintiffs' cause of action for inverse condemnation which was prejudicial.

The sole function of a demurrer is to test the sufficiency of the pleading it challenges. A general demurrer admits the truth of all factual material allegations properly pleaded, as well as the facts essential to a cause of action which the facts alleged supply by implication or inference. Harvey v. Holtville, 271 Cal.App.2d 816, 819 (1969).

The defense that an action is barred by the statute of limitation may be raised only when the ground of the objection appears affirmatively on the face of the pleading or from matters of which the court must or may take judicial notice. C.C.P. §430.30(a); Basin Construction Corp. v. Department of Water and Power, 199 Cal.App.3d 819, 821-823 (1988).

A full and fair reading of the inverse condemnation cause of action demonstrates that nowhere therein does it appear affirmatively on the face of the complaint, or from matters of which the court must or may take judicial notice that the right of action is necessarily barred (J.A. 1: 1-42). Pulver v. Avco Financial Services, 182 Cal.App.3d 622, 635 (1986); Valvo v. University of Southern California, 67 Cal.App.3d 887, 895 (1977).

On the facts alleged, no way does it appear affirmatively that the cause of action for inverse condemnation is necessarily barred by the statute of limitations contained in Government Code §66499.37. Because of this fact it was not necessary for appellants to anticipate defenses in avoidance and in bar of the appropriate statute of limitations. Sullivan v. Shannon, 25 Cal.App.2d 422 (1938); Heyer v. Flaig, 70 Cal.2d 223, 230 (1969).

(b) That based on the facts well pleaded and the clear language of the statute the trial court improvidently and prejudicially applied the wrong statute of limitations.

(1) Objections to defendants' legal argument which are apparent within the four corners of the inverse condemnation cause of action.

In an inverse condemnation cause, the action must be filed within three years of the discovery of the damage (C.C.P. §338(j), while an action based upon a taking of property generally is to be filed within five years of the taking (C.C.P. §§318, 319).

If the "taking" is regulatory, the land owner ordinarily, if a party, must challenge the agency's action through the administrative mandamus procedure (C.C.P. §§1094.5, 1094.6). In the "taking" in our case, the plaintiffs are not a party and it is not regulatory but a physical "taking" by "The City" affecting an

involuntary traffic servitude and by invading and interfering with plaintiff's protected, vested property interest and therefore neither C.C.P. §§1094.5, 1094.6, or Government Code §66499.37 are applicable (J.A. 257: 13-20). The statute of limitation provided for in Government Code §66499.37 is clearly in connection with a regulatory taking under the "S.M.A." and as such is designed to apply to applicants and not non-parties who suffered a physical "taking."

The determination of the applicable statute of limitations period in an administrative mandamus proceeding is complex. However in the inverse condemnation cause standing on its own, it is a clear-cut cause for a physical "taking" of private property by "The City" for a public purpose and should not be confused by going outside the four corners of the inverse condemnation cause of action, and getting involved in the complexities of "statute selection." The trial court assumed facts improperly in selecting and applying the wrong statute of limitations.

The plaintiffs' first cause of action for inverse condemnation has assumed for said action that "The City's" deliberate acts were for the purpose of fulfilling a public object which resulted in "taking" plaintiffs' private property in furtherance of a public objective (J.A. 253; 4-8; 23-28; 254; 27-28; 255; 1-3). That the public improvement, being the traffic diversion plan, was the proximate cause of plaintiffs' injuries (J.A. 253; 23-28; 254; 1-2). "The City" accomplished its intended public purpose of diverting traffic by relocating the access to the new subdivision (at plaintiffs' expense) (J.A. 256; 11-24). The plaintiffs were not parties in the "S.M.A." proceeding only witnesses-objectors. Further, plaintiffs didn't and don't now object to the subdivision itself, but rather avers that the traffic diversion plan implemented by the relocation of the access to the subdivision is the gravamen of their objections.

Accepting arguendo that said §66499.37 is the correct statute of limitations, it does not apply to the plaintiffs' cause of action for inverse condemnation because nowhere (directly or indirectly) in that thirty-two page cause of action does it "challenge" the decision (J.A. 250-262). Yee v. Saualito, 141 Cal.App.3d 917, 920-922 (1983).

When the cause of action "attacks" the proceedings and/or decision said §66499.37 normally would apply. However, if the cause of action "attacks" the decision and also seeks compensation, its application is far from clear. But if, as in the case at bar, the cause of action for inverse condemnation is devoid of any "challenge," directly or indirectly, but merely seeks just compensation, the unambiguous statute clearly is inapplicable. C.C.P. §1858 states as follows:

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

(2) Objections to defendants' legal argument which are apparent, looking at the record as a whole.

The above defenses to the bar of the statute of limitations can be decided on the facts set forth in the inverse condemnation cause of action (J.A. 1-42) and the clear language of the statute (Gov. Code §66499.37) only. In addition, the plaintiff-appellants assert that the following defenses in bar, avoidance and suspension of said statute should also be considered: equitable estoppel; equitable tolling; special relationship; rule of discovery; fraudulent concealment and judicial suspension. The first two rulings the court stated at the end, it "appeared" that the cause of action was barred. In its last ruling it stated that the cause of action "is" barred (J.A. 631). Appellants read the words "appear" as the same as "seems" or "looks like." That based on the law that "it must appear affirmatively on the face of the complaint that the right of action "is barred, saw no reason to plead anticipatory defenses to the statute of limitations that may be barred. Upon the court making it clear that it thought that the statute of limitations did apply, all subsequent pleadings alleged facts to support defenses in avoidance and in bar of the statute of limitations (J.A. 542).

Plaintiffs' cause of action for a writ of mandate from the beginning, set forth these facts (J.A. 15; 154; 271; 393). The subsequent pleading was not the result of "creative pleading." The reason they were not included in the inverse condemnation cause was because there was no need to do so. It was an abuse of discretion in light of the record not to permit the plaintiffs leave to file an amended complaint. It was the first time the court ruled that the cause was barred. Although the court is not permitted to consider the allegations in the other causes of action in ruling on the demurrer, it certainly should have viewed the whole record to determine if it was not only probable but was it possible that plaintiffs could cure their complaint.

The plaintiffs-appellants will identify these other defenses and key them into the subsequent pleadings where appropriate:

(i) Because of the deception and misrepresentation of the respondents as alleged in the complaint they are "equitably estopped" from pleading the bar of the statute of limitations (J.A. 555; 3-28; 556; 1-5). Kleinecke v. Montecito Water District, 147 Cal.App.3d 240, 245-247 (1983); Neel v. Olney, etc. et al, 6 Cal.App.3d 176, 189 (1971).

(ii) In addition to the doctrine of equitable estoppel, the complaints also set forth facts to support the doctrine of "equitable tolling" and is also applicable. Appellants gave prompt notice and made informal and formal claims upon "The City;" and said respondent was not prejudiced by the delay, and appellants' conduct was in good faith and reasonable (J.A. 258: 15-20). Addison v. State of California, 21 Cal.3d 313, 319 (1978).

(iii) The plaintiffs' complaint alleges facts to show the "special relationship" that existed between the appellants and the respondents. The duty to be imposed on the defendants should be analogous to that of a "fiduciary relationship" (J.A. 555; 3-28; 556; 1-22). Sanchez v. South Hoover Hospital, 18 Cal.3d 93, 101, 102 (1976); Evans v. Eckelman, 216 Cal.App.3d 1609, 1613-15 (1990).

(iv) The "rule of discovery" is applicable to this case and is supported by the facts alleged in the Complaint as aforesaid (J.A. 556; 23-28; 557; 1-6). Leaf v. City of San

Mateo, 140 Cal.App.3d 398, 406-9 (1980); Manguso v. Oceanside Unified School District, 88 Cal.App.3d 725 (1979).

(v) The doctrine of "fraudulent concealment" is also applicable based on the facts in the complaints and the law (J.A. 557; 16-28; 558; 1-11). Pashley v. Pacific Electric Railway Co., 25 Cal.2d 226, 229, 230, 231 and 236 (1944).

(vi) The long and well established "judicial suspension exception" to the bar of the statute of limitation was articulated by the Court in Pierpont Inn Inc. v. State of California, 70 Cal. 282, 293 (1969). The case is on "all fours" with the case at bar (J.A. 258: 15-20) and deserves special consideration.

Plaintiffs' complaints read as a whole set forth well plead facts to support anyone or all of the above identified defenses to the statute of limitations. It was an abuse of discretion not to allow plaintiffs to amend their complaint at least once after ruling that the statute is a bar.

(3) Objections to defendants' legal argument based on the fact that the proceedings, decision and law are null and void, and can be attacked at any time.

Related but being dealt with separately because they are not only different in degree but in kind (III E, pp. 42-47). These objections relate to proceedings and/or decisions that are null and void as being without or in excess of jurisdiction, as well as unconstitutional deprivations and laws that render them null and void; accordingly the defenses based on the doctrines of res judicata, collateral estoppel, and statute of limitations are inapplicable.

At pages 10-21:

III. DISCUSSION

A. THE PLAINTIFFS STATE A GOOD CAUSE OF ACTION FOR INVERSE CONDEMNATION THAT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

1. Respondents ignore or misread the admitted allegation of facts stating that appellants' private property was "taken" by "The City" for public purposes.

The respondents raise only one substantive defense to appellants first cause of action, inverse condemnation. They claim that the taking was not for "public use."

The record in this case shows beyond any doubt that the cause of the "taking" is based on "The City's" traffic diversion plan and was accomplished by requiring "The Developer" to locate the sole access to the 132 home subdivision across the street from appellants' home.

Appellants think proper to emphasize that "The City" certainly has no protection in the present litigation from the rule stating that "where a city's sole affirmative action is the mere approval of a subdivision map and the issuance of permits it will not be held liable to a claim of inverse condemnation."

In Ullery v. County of Contra Costa, 202 Cal.App.3d 562 at p. 569 (1988), the court indicates a range of liability for inverse condemnation by contrasting the Yox case with other cases.

In the case now here "The City" went far beyond the sole affirmative action referred to in Yox.

"The City" dictated the access change "for traffic safety purposes," 2(J.A. 252, 292). The entire system was a public improvement, for a public use, on publicly maintained property. The respondents were successful in persuading the trial court of many of their arguments. However, the trial court in the order appealed from did not use appellants' defense of "no public use" as a reason for sustaining the demurrer.

The respondents base their argument on a false premise. They assumed their facts and not the facts as alleged in the complaint. Further, if they raised them in their answer as they should, the facts would be refuted by those alleged in the complaint.

The complaint alleges that the cause of the appellants' injuries were "The City's" traffic diversion plan, and locating the access was merely a means to accomplish their end. This is clearly a public purpose and use. "The City" was unconcerned about the private entryway, only its location to control traffic.

2. The trial court erroneously and prejudicially sustained the defendants' demurrer to appellants' first cause of action for inverse condemnation by improperly speculating what statute of limitations applied and applying it improvidently.

The trial court used the wrong standard of review in determining that the statute of limitation contained in Government Code §66499.37 applied to the case stated in the complaint (A.O.B. 18-26) (infra pp. 1-4).

3. The contemporary standard of "takings" under the law in regulatory "taking" confirms that appellants state a good cause of action for inverse condemnation.

Appellants have stated that: "Accepting arguendo that the 'taking' of the plaintiffs' property was effected by a regulation, it still could pass that test and constitute a compensable 'taking'" (A.O.B. 15). The appellants thereafter reviewed the law of regulatory taking (A.O.B. 15-17).

From the above summary it is fair to say that in regulatory taking law the general rule is that when the government takes property for public purposes the private landowner is entitled to just compensation. In Lucas v. South Carolina Council, 505 U.S.--, 120 L.Ed2d 798, 112 S.Ct. 2886 (1992), the court narrows the longstanding "police power" exception to this rule.

The opinion also makes clear that if the landowners can prove that their distinct and reasonable investment-backed expectations were substantially invaded or interfered with by a

public entity, or a public entity permitting others to do so, the public entity will be constitutionally compelled to pay for the taking.

It is beyond argument that California has a long tradition of protecting a person's right to exclusive possession, use and disposition. Gregory v. San Juan Capistrano, 142 Cal.App.3d 72, 87-90 (1983). Two out of the three principle protected property interests have been taken and the right of alienation significantly affected.

The plaintiffs in the case at bar have vested protected property interests. The factual allegations in the complaint support the conclusion that their reasonable investment-backed expectations as to their use and enjoyment of them were all taken from them.

The United States Supreme Court's definition of property in the great bulk of the cases where the definition of property is at issue, has defined "property" as economically valuable rights created by positive law. For example, in United States v. General Motors Corp., 323 U.S. 373 (1945), the Court stated that property for "taking" clause purposes consists not of the tangible thing itself, but rather of certain "rights recognized by law" with respect to that thing. The following is a passage that is frequently cited in the Court's "taking" decisions (pp. 377-8):

> It is conceivable that [the term 'property' in the taking clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relationship to the physical thing, as the right to possess, use and dispose of it. In point of fact the construction given the phrase has been the latter."

This definition was quoted with approval in Agins v. Tiburon, 24 Cal.App.3d 266, 273 (1979). In a procedural due process case (as distinguished from a taking clause case) the

Court states that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The Lucas opinion makes explicit what has been acknowledged time and again by the Court that the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with the distinct "investment-backed expectations" are keenly relevant to takings analysis. The key is that you must look at the property being regulated, rather than the property as a whole, and this, from the claimant's point of view. In this connection the court will take judicial notice that it is possible to live in an untenantable house.

Thus in both types of cases the Court has treated intangible, economically discrete interests as protectable property rights and compensable if "taken." The Lucas court in its footnote 7 on pages 813 and 814 focuses on the definition of property. It states:

> "Regrettably, the rhetorical force of our 'deprivation of all economic feasible use' rule is greater than its precision, since the rule does not make clear how the 'property interest' against the loss of value is to be measured."
>
> "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State law of property, i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which, the takings claimant alleges a diminution in (or elimination of) value."

On a different but related issue is the question of property as a vested right. It is clear that when the government grants a legal right it can be subject to expressly or implicitly reserved power to change the law. Under those circumstances, if the

government takes that right back, the claimant has not lost any "vested right."

Respondents' argument that appellants' property rights are not "vested rights" is misplaced. Appellants' rights to possession and use of their property is based upon the positive law of California and is not subject to any express or implied power in the government to take those rights away. C.C. §654; Gregory v. San Juan Capistrano, 142 Cal.App.3d 72, 87-90 (1983). Any such effort to do so would be in violation of the Constitutions based on the positive law as well as our normative standards.

"The City" together with "The Developer" created an environment which the plaintiffs relied on and with justification. The name of the street was changed to Corte de la Vista, "the street of the view." The plaintiffs invested substantial sums into their home to make maximum use of their location and make it adaptable especially to their lifestyle. The primary use and value of their property has been destroyed by air pollution caused by the diversion of traffic. The plaintiffs' protected, valuable property interests were taken from them in violation of the United States Constitution and its laws and the California Constitution and its laws.

Appellants anticipated prior to buying and improving their home that the adjacent property would be subject to a residential subdivision. They do not claim that the development was unexpected. However, their claim is not directed to the fact of the subdivision itself, but rather avers that the particular details of the existing traffic control plan, specific plan, and the general plan, were all relied on by appellants.

In Topanga v. County of Los Angeles, 11 Cal.3d 506, 517, the court states:

> "A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare." (Citations omitted.)

Appellants have sustained damages by the unjustified, unexpected and unconstitutional variance of the traffic control plan. The funneling of the traffic to a 132-home subdivision into one access located across the street from their home, subverts the critical reciprocity upon which community planning regulations rests. The traffic diversion plan also effected a compensable "taking" of a traffic servitude.

Civil Code §654: "The ownership of a thing is the right . . . to possess and use it to the exclusion of others . . ."; Duckett v. Adolph Wexler Bldg. & Finance Corp., 2 Cal.2d 263, 265 (1935). "The landowner's property right to exclude the use and possession by others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

The respondents cite Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785 (1976) to support their argument that "appellants have no vested rights in zoning." They confuse appellants' rights in "possession and use" with a claim for a "vested right in zoning."

Next respondents confuse appellants' reliance on their reasonable investment-backed expectations, "as reliance on zoning." Appellants have not claimed a "vested right in zoning." Appellants' complaint alleges that they did rely on "The City's" general and "The Developer's" specific plan as well as the existing ideal residential environment of their location, 2(J.A. 254; 926). This is not reliance on zoning, as a vested right, but it does constitute a major element of their reasonable investment-backed expectations. "The City's" traffic control plan was designed and implemented in violation of the general plan, 2(J.A. 400: 26-29; 408: 10-14). It also was beyond "The City's" authority and jurisdiction (A.O.B. 42).

Lastly, respondents confuse the distinction between traditional "vested rights" in property, and a developer's "vested rights" which is based on the principles of estoppel. The respondents' Avco case on pages 791-793, dealt with "The Developer's" species of "vested rights" and has no application on this point. (It does however have application to show that "The

Developer" never acquired a vested right until after the hearing on the final map and even after this lawsuit was filed, 2(J.A. 407: 11-18).)

This small selection from respondents' brief, on this one point, is in microcosm the technique used throughout their briefs and pleadings. It must be obvious that it contains: respondents' "facts" and not the facts alleged in the complaints; spurious arguments that obfuscate the real issues; and cite cases of two kinds, those that are clearly distinguishable, and those that have some relevancy. In the latter category it will be found that those cases support appellants' case and not theirs. Because this has been a pattern, it is difficult to explain as a lack of knowledge.

Appellants have attempted to restrain themselves from littering their brief with like examples. This for two practical reasons: One, they wished to use the space available to develop their case in a positive manner; and two, the courts understandably don't approve. Accordingly, appellants will not pursue this further, unless the Court so orders.

If the landowners can prove that all of a discrete part of their property was "taken," they may have a compensable "taking" under the Constitution if this discrete part was (a) a vested, protected property right, and (b) denies "economically viable use and/or their reasonable "investment-backed expectations," and (c) that it destroys or substantially damages the landowner's interest in their property. The primary consideration is the effect on the individual's use of the property from his perspective.

"The City" improperly appropriated a traffic servitude on plaintiffs' property. The plaintiffs' vested, protected property interests have been invaded and interfered with. The right to possess and use, to the exclusion of others, has been destroyed. The loss of the "personal sanctuary" aspect of their home is both a substantial and significant loss to appellants and also destroyed their reasonable investment-backed expectations.

> "The plaintiffs purchased their home to enjoy the out-of-doors living and comfortable indoor living

without air-conditioning, and both features have been substantially and significantly damaged and/or destroyed by the defendants and each of them as herein alleged." 2(J.A. 258: 5-9)

"The plaintiffs have incorporated a group of photographs into their group Exhibit B1-20 which demonstrates in a tangible and concrete manner that what has been alleged as the reason for their purchase and subsequent improvements was not an after-thought but was a distinct investment-backed expectation." 2(J.A. 258: 10-14)

Harding v. State of California ex rel D.O.T., 159 Cal.App.3d 359 (1984) has substantially the same facts and issues as the case at bar. It held on page 367 that:

"Thus, California courts have extended the peculiar and substantial burden standard to airport noise cases and noxious odor cases. Both these classes of cases at one time required physical taking before compensation was allowed. People suffering damages from their proximity to a highway should not be unequally required to allege and prove a physical invasion (see Comment, The Highway Cases: Noise as a Taking or Damaging of Property in California (1980) 20 Santa Clara L.Rev. 425).

Plaintiffs in this case have alleged unique damage to their property from dust, debris and highway noise. As the court held in Varjabedian, they should be allowed to establish that they suffered a peculiar and substantial burden as a result of their proximity to the highway. The substantiality of the interference may be determined by use of modern measurement techniques as in airport noise cases or by testimony regarding the actual physical invasion of their property by dust and debris as in Varjabedian.

> Thus, compensation must be rationally related to the degree of harm suffered and will not be dependent upon an arbitrary standard that is tied to a physical appropriation or chance location of plaintiffs' property."

"The City's" constitutionally improper appropriation of a traffic servitude effected an out and out "physical taking" without paying just compensation. The cost must be divided equally and paid for by the entire community.

We are told that dissenting opinions are enlightening but are not to be cited in briefs. Effective Appellate Advocacy, by Frederick Bernays Wiener, 1950, Prentice-Hall Inc. Because Justice Brennan's unique 25 page dissenting opinion in San Diego Gas & Electric v. San Diego, 450 U.S. 621 (1981) was, when rendered, the "constructive" majority opinion on the merits of the case, and further, because it was the precursor of First English and Nollan, infra, and their progeny, which have been a self-fulfilling prophesy, an exception to the rule is defensible. (Justice Brennan's opinion).

> "Police power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." (Page 652.)

> "In my view, once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date of the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." (Page 653.)

"Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." (Page 657.)

"That guarantee was not designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be born by the public as a whole." (Page 656.)

APPELLANTS' PETITION FOR REHEARING

At pages 5-13:

I.
DUE TO THE RESPONDENTS' WRONGFUL USE OF ITS "SPEAKING" DEMURRER, THEY HAVE DEVELOPED THEIR OWN SCENARIO THAT IS INCONSISTENT WITH THE FACTS IN THE COMPLAINT. THIS INDUCED THE COURT'S MISUNDERSTANDING OF THE FACTS. THIS IS THE MAJOR ERROR AND ALL OTHER ERRORS STEM FROM THIS FALSE PREMISE. THIS IS TRUE OF THE COURT'S RULING ON APPELLANTS' INVERSE CONDEMNATION CAUSE OF ACTION

The root cause of all the Court's errors can be traced to the scenario that Respondents have fabricated. The proceedings in the lower court were all in the motion court and were presided over by the Honorable Thomas R. Murphy. This court, more than most courts, carries an extraordinarily heavy case load. Based on many appearances before Judge Murphy, it is clear that he is by nature well suited to perform the judicial functions of this Court and his demeanor manifests it. It was also apparent from his questions and statements that he possesses an honest bias for government in connection with claims like the Appellants are making.

Because of the trial court's seeming predisposition in favor of the City in cases like this, together with the heavy case load, it

may be susceptible to being persuaded to adopt Respondents' scenario of the facts as an honest mistake. This error would have the added advantage of leading to the conclusion desired. It is readily admitted that to read the voluminous pleading,[1] is most time-consuming, tedious and boring. Add to this, all of the motions and briefs associated with ruling on these pleadings, it is understandable that Courts may consciously or unconsciously rely on "facts" presented by the party they believe to be right.

Under the rules, for the purposes of reviewing a complaint, it must be assumed that all facts alleged are true. The Court cannot permit itself to be wrongfully influenced by the Respondents' "facts" and must be vigilant that they do not fall into this trap. This is all the more important when to rely on Respondents' "facts" will result in doing an irreparable injustice.

Respondents' techniques of repeated clichés, based on generalities of facts and laws that are inconsistent with the facts and law in Appellants' case (and also not true in fact) is reminiscent of the technique used by Joseph Goebbels. For those lucky enough not to be that old, he was Hitler's propaganda minister and confidante. His policy was based on the notion "that a lie, repeated often and forcibly, gains the legitimacy of truth." Appellants fear that the trial Court was victimized by the use of this technique and that this Court may be also, if not called to their attention.

A few examples of Respondents' "clichés" should suffice to demonstrate and identify their use in their briefs. These are not quotations but merely fair paraphrased generalities of Respondents' "clichés."

1. You had notice and you had a hearing and you are barred because you failed to seek judicial review.

2. That all your common law, statutory and constitutional Causes of Action are barred because they are based on the city's

---

1 Appellants Second Amended Complaint for Counts I and II and the Third Amended Complaint for Count III as well as the Amended and Supplemental Complaint.

approval of the proposed subdivisions and you failed to seek judicial review in a timely fashion.

3. Appellants do not have recognized property rights or constitutional rights.

4. Plaintiff expected no interference with their view.

5. Plaintiffs cannot rely on zoning.

6. Plaintiffs are obstructing "land use planning" by the misuse of defenses in bar of the statute of limitations.

7. Plaintiffs objected to the subdivision.

These and like statements are inconsistent with the facts in the Complaints. Where cases are cited in support of the statements, they are not applicable to our case and the few that may be applicable, support Appellants' case.

Appellants respect the Court's reluctance to be involved in disputes like this between attorneys. Be assured, Appellants also find it most distasteful. Further, it has not been motivated out of malice or a desire for retribution. We know of no other way to alert this Court of Appellants' fears that they may also be unknowingly misled.

The Court's opinion, on page 7 states in part:

> . . .that the action causing the alleged taking or damage to the Masses' property is the private property development by Fieldstone.

With all due respect, Appellants believe that this statement misstates the material facts as alleged in their complaint. More particularly, without limiting the generality of the foregoing, the Court's attention is called to the Planning Commission's meeting of October 3, 1990, page two, third paragraph 2 (J.A. 292) which provides as follows:

The project is proposed as a gated community. The gate design is single access off Corté de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corté de la Vista.

The relocation of the access gate to the proposed subdivision was merely the means to accomplish the City's objective of regulating traffic for "public safety purpose" and this on its publicly owned, constructed and maintained streets 1 (J.A. 33). The diverting and funneling all this high volume of traffic (from 132 single, family homes) just across the street from the Appellants' residence, resulted in a public taking, for a public purpose, for a public use and all on public property as alleged in their Complaint 2 (J.A. 250-300).

Fieldstone's proposed subdivision, including the access gate, is indeed private property. However, if the Complaint is given a reasonable interpretation, reading it as a whole and its parts in their context, then Fieldstone caused no inverse condemnation taking or damages. (The Appellants' claim against Fieldstone is limited to two Causes of Action based on negligence, causing nuisance-type damages as set forth in Count II of their Complaint 2(J.A. 260-270).) The Complaint also makes clear that Appellants had no objection to the proposed subdivision. Nor does the Complaint allege that private property, including the gate, caused the taking.

The substantial, immediate, direct and proximate cause of Appellants' damage is the diversion and funneling of the traffic which was accomplished by the city by "requesting" that the entrance be moved to Corté de la Vista 1 (J.A. 33).

Respondents' demurrer admits all material facts properly plead and in addition, the city has removed all doubt by explicitly admitting that "the location of the single access was dictated by staff "for traffic safety purposes...." 2 (J.A. 292).

The traffic diversion was the "public improvement" for traffic safety purposes for the benefit of the public as a whole. Thus, the admitted facts show that the City, acting in furtherance of public objectives, took and/or damaged Appellants' private property without just compensation. The Appellants should not be made to suffer a disproportionate burden for the benefit of the public as a whole.

The case of Yee v. City of Sausalito (1983) 141 Cal.App.3d 917, is, by compelling analogy, opposite to our case and is most persuasive.

In the Yee case, the property owner brought an action against the City for inverse condemnation alleging that, a public improvement, namely, a storm drain system for diverting rain water and used as deliberately planned and designed, was the proximate cause of the taking of their property. The trial Court granted the City's motion for summary judgment and the Court of Appeal reversed.

The Court held that the Appellants had stated a valid cause of action for inverse condemnation since the public safety purpose of the plan was served. In so holding, the Court applied the rule that inverse condemnation is the remedy for injury to private property where the damages are proximately caused by a public improvement used as planned.[2]

In our case, the city's traffic diversion plan, adopted for a "public safety purpose" and this public safety improvement being used as planned and designed is the proximate cause of Appellants' injury. The fact that the traffic diversion was not designed or planned to take Appellants' property is irrelevant. It fulfilled the objective of public safety and at the same time was the proximate cause of Appellants' injury. The Yee Court states on page 920:

> The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damages. (Citations omitted.)

In our case, the public purpose served by the traffic diversion plan was to "collect and convey" the traffic from Alicante Road and funnel it to a point across the street of Appellants' home. The injury is occurring in increasing increments as the development is being constructed and occupied. The traffic diversion for public safety is also

---

2 The record in the Yee case is not clear but it can reasonably be presumed that the collection of rain water included run offs from private evelopments. Based on Respondents' reasoning, they would argue that the private developments were the proximate cause.

functioning as deliberately planned and designed. The Appellants are being injured as a proximate cause of the public improvement.

The fact that our case arises out of acts and conduct taken by the City in connection with its land regulation duties does not nor can it be constitutionally construed that the Subdivision Map Act (S.M.A.) supplants the common law remedy of "inverse condemnation" or provides a governmental immunity.[3]

Lacher v. The Superior Court of Orange County (1991) 230 Cal.App.3d 1038, 1050, 1051 (Lacher). Nor did it amend the constitution, prohibiting the taking of private property for a public use or purpose without full and fair compensation. Further, neither the Planning and Zoning Laws (Government Code, §65000 et seq.) nor the S.M.A. (Government Code, §66410 et seq.) which cover governmental approval of real estate development apply to physical taking cases but only to regulatory taking.

The complaint alleges a physical taking case. The complaint in the Yee case for inverse condemnation is substantially the same in all material respects and the Yee Court ended its opinion by stating on page 923:

> Based on the record before us, the Appellants have stated a valid cause of action for inverse condemnation and should be allowed to proceed to trial on the merits, subject to all available defenses.

Because of the law and logic of the Yee case, this Court is respectfully urged to follow its holding.

The Court's reliance on the Ullery v. County of Contra Costa (1988) 202 Cal.App.3d 562 (Ullery) and Yox v. City of Whittier (1986) 182 Cal.App.3d 347 (Yox), as being opposite to our case does not bear up upon close scrutiny. The Court's statement on page 7 of its opinion that:

---

3 Under the umbra of its duties relating to the approval of subdivisions, there is no governmental immunity for inverse condemnation liability.

> If Fieldstone's initially proposed map had reflected the access gate location on Corté de la Vista and the City had merely given broad approval of the map without requiring any changes, the rule of the Ullery and Yox cases would undoubtedly apply as the City would have merely approved the subdivision map.

The Court's statement tacitly admits that the cases are distinguishable. In extending the Ullery-Yox holding, the Court has created a new and huge immunity to governmental agency. The Court, in its opinion on page 8, concludes that, any and all, "conditions or requirements" imposed by the government in connection with approval of subdivision maps, do not constitute "public" uses or purposes which would subject the government to inverse condemnation liability. It was an error to rule on this issue because that issue was not proposed or briefed by the parties. The Subdivision Map Act (S.M.A.) cannot bar a homeowner's action for inverse condemnation even if provided for by the legislature explicitly. Lacher, supra, and Horn, infra. Both Harding, infra and Yee, sufra, would find that the Complaint herein states a good cause of action. 1 (J.A. 33), 2 (J.A. 398).

The following statements, made by the Court in its opinion, are errors owing to a mistake of law and/or a misunderstanding of the facts:

(a) Private property caused the taking and the damages. (Not so; it was the traffic diversion.)

(b) The City cannot be liable for inverse condemnation for merely relocating the access gate on private property. (Under the Constitution, the City cannot take private property for a public purpose without just compensation.)

(c) The only alleged involvement of the City was its approval of the subdivision map. (Not true; it adopted and approved a traffic diversion plan for public purposes that took and damages Appellants private property, without compensation.)

There is a close nexus between the traffic diversion plan and the injuries sustained by the Appellants. For the Court to hold that "the City's conditions" was not a "public taking" is to confuse means and ends. The end was traffic diversion for the public safety. The means used was the relocation of the access gate. The tail does not wag the dog.

It is prejudicial error for this Court to affirm the trial Court's order, sustaining the Respondents' Demurrer to the Complaint for inverse condemnation, based on the reasons advanced by the trial Court and its own independent reasons.

SUPPLEMENTAL PETITION FOR REHEARING AND/OR REPLY BASED ON EGREGIOUS MISSTATEMENTS OF FACTS AND TO BRING TO THE COURT'S ATTENTION THE U.S. SUPREME COURT OPINION FILED ON JUNE 24, 1994

At pages 1-4:

I.
SUPPLEMENTAL JUSTIFICATIONS FOR THIS FILING AND GRANTING A REHEARING

1. RESPONDENTS' NOTORIOUS EGREGIOUS MISSTATEMENTS OF FACT.

Respondents' misstatements of facts are so substantial and significant that the Court will find the attached "index" helpful to ferret them out. This should set the record straight.

2. NEWLY DISCOVERED CONTROLLING AUTHORITY.

The decision in the Dolan v. City of Tigard ("Dolan"), 94 D.A.R. 8803 (6-24-94), was entered only days prior to Appellants' filing their Petition for Rehearing. Appellants' inverse condemnation case is based on a "physical" taking, however, in this context it is a distinction without a difference. A copy of the opinion is attached hereto for the Court's

convenience. Appellants respectfully submit that it is controlling in this case.

3. RESPONDENTS SUGGEST SANCTIONS AGAINST APPELLANTS IN THEIR ANSWER.

The Appellants deny that they reinserted material that the court had ordered removed. The trial court denied Respondents' request for sanctions. The Respondents did not appeal that order and that matter is *res judicata* and it is improper to raise the issue.

II.
ARGUMENT

The points and authorities in support of Appellants have been completely and clearly, covered in their complaints and briefs and will not be repeated here. The nature and extent of the Respondents' misstatements of fact have only recently been discovered. Respondents' answer, with its tangential issues have compounded and aggravated the situation. In addition to the authority cited in the Petition, indemnification contract, even if otherwise legal, cannot extend to damages in inverse condemnation. Kramer v. City of Los Angeles, (1972) L.A.S.C. 993, 728 and Greater Westchester Homeowners Association v. City of Los Angeles (1970) L.A.S.C. 931, 989. The justification for bringing the Dolan case to the Court's attention is self-evident.

III.
CONCLUSION

Time limitations prevented a more detailed index. No guide will be a substitute for reading the complaints. Only then will it become apparent that Respondents "facts" are inconsistent with the facts alleged by Appellants. If the facts are given the maximum of judicial review, with independent judgment, as a *de novo* proceeding it will show that Appellants' contentions are supported by the law.

The Second Amended Complaint, the Third Amended Complaint for the Third Cause of Action and the Amended and Supplemental Complaint 3(J.A. 542-576) are all part of the record and set forth all the facts in this case. Given "...a reasonable interpretation, reading it as a whole and its parts in their context, constitutes the 'facts' in this record." They will speak for themselves.

The record shows that the executive branch of the City and its legislative branch together with the state legislature have failed in protecting Appellants' property and civil rights under our constitutions. If the judiciary fails to protect the Appellants and other contiguous homeowners from the wrongful deprivation of their property and constitutional rights, to whom do they turn?

Developers believe it is expedient to crush any neighbor homeowners that challenge their proposed subdivision. The merits or the size of the claim is irrelevant to them. They feel they must punish "NIMBYS," seek sanctions every step of the way, and make them sorry they ever dare to file a suit against them and make an example of them. The understandable result of this policy is that it is financially inexpedient for these homeowners to seek a judicial remedy. As a practical matter, the courthouse doors are closed to them.

We are inherently vulnerable and unrepresented in our government. The votes of this group are not substantial and significant enough to have any effect. Are we to merely suffer silently, these injustices? Or do we join the growing number who are cynical and distrustful of our government and have a contempt for all government? Are these the types of deprivations and humiliations that Thomas Jefferson had in mind when he drafted these words:

> But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and provide new guards for their future security. The Declaration of Independence, July 4, 1776.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At pages 5-13:

A. THE COMPLAINT STATES A GOOD CAUSE OF ACTION AGAINST THE CITY FOR INVERSE CONDEMNATION.

1. The Complaint alleges the taking of private property for a public use and purpose, without compensation.

2. SMA defenses, including the statute of limitations are not applicable to non-parties, non-regulation taking.

3. Taking that results from legislative and quasi-legislative action has a more restrictive test than those that arise out of adjudicatory proceedings.

4. The test for a regulatory taking is also stricter than a physical taking.

5. There is also a distinction between a use restriction and the taking of a protected interest in property.

6. Both federal and state law support the allegations of the Complaint that Appellants have protected valuable property rights that have been taken by the traffic easement.

Authority in support of this heading and its subheadings are grouped together for the convenience of the Court[4].

---

4 Holtz v. Superior Court of San Francisco (1970) 3 Cal.3d 296, 303,304; Varjabedian, infra; Harding, infra; United States v. Causby, infra; First English, infra; Nollan, infra; Lucas, infra; Dolan, infra; United States v. Orito (1973) 413 U.S. 139, 142 ("The Constitution extends special safeguards to the privacy of the home.")

II. STATUTE OF LIMITATIONS

APPELLANTS' OPENING BRIEF

At pages 38-47:

D. TRUNCATED LIMITATION PERIODS REQUIRED NOTICE TO PLAINTIFFS TO BE CONSTITUTIONAL.

"The City" had no intent and made no effort to afford the plaintiffs a C.C.P. §1094.5 type of hearing. This is confirmed by the trial court's conclusion that plaintiffs' writ of mandate action is not an administrative mandamus action but an ordinary mandamus action pursuant to C.C.P. §1085. In that case, plaintiffs as non-parties to the proceeding between the respondents would not be bound by the ninety day statute of limitations contained in C.C.P. §1094.6(b) or the statute of limitation period contained in Government Code §66499.37 of the "S.M.A." Thus plaintiffs' actions would be controlled by the three year or five year statute of limitations.

C.C.P. §1094.6 provides for judicial review of a decision by a local agency pursuant to C.C.P. §1094.5. Plaintiffs do not appear to be within the class of persons who are subject to either the benefits or limitations therein provided for. However, in light of the recent holding in El Dorado Palm Springs, Ltd. v. Rent Review Commission, 230 Cal.App.3d 335, 344-348 (1991) ("El Dorado") and on analogy to its reasoning, it has an impact on issues subject to this Court's review.

The parties in the El Dorado case agreed that C.C.P. §1094.6 governs the timeliness of filing the cause of action for a writ of mandate ("W.O.M."), that the "W.O.M." was filed more than ninety days after the written decision was issued and that the respondent never gave El Dorado direct notice of the time within which judicial review must be sought. The parties did disagree as to whether the cause was filed in a timely manner under the set of circumstances before the El Dorado Court. The court held that the period was tolled by failure of the respondent to comply with the notice requirement of C.C.P. §1094.6(f).

The El Dorado court held that the writ of mandate cause of action was not barred by the ninety day statute of limitations set forth in C.C.P. §1094.6(b). In arriving at their decision they reviewed the background of the legislation and quoted liberally from Hittle v. Santa Barbara County Employee's Retirement Assn, 39 Cal.3d 374, 386-387 (1985) and Cummings v. City of Vernon, 214 Cal.App.3d 919, 922-923 (1989). They found that prior to the enactment of §1094.6, judicial review of administrative mandamus was subject to the general statutes of limitations and that was three or five years unless otherwise specified. For good and valid reasons the Legislature gave local agencies the option of adopting a ninety day limitation period. However, the Legislature considered it vitally important that parties be notified that a ninety day period is applicable, instead of a three or five year period. Since §1094.6 benefits local agencies by reducing the statute of limitations, it requires local agencies to assume the "burden" and give notice of this fact. At page 346 of its opinion, the El Dorado court concluded that the ninety day statute of limitations provision be read so that the said limitation period be tolled until such time as the "subdivision (f) notice" is given. Considerations of fairness and constitutional due process dictates that direct notice be given to the aggrieved persons of the truncated statute of limitation resulting in a drastic reduction of time from three or five years to three months. The Legislature required local agencies to give notice of the truncated statute of limitations, the Courts should require the Legislature to do the same.

The case at bar provides this Court the opportunity to provide remedial relief from the limitation period in Government Code §66499.37 of the "S.M.A." It can find that the Legislature impliedly intended to toll the ninety day limitation period until such time as notice of it was given. It could, in the alternative, hold the truncated statute of limitations to be unconstitutional because the Legislature failed to expressly provide for direct notice of the drastically reduced period (see supra, denial of due process III C 1 (a) and (b)). Also, the court could instead steer a middle course and apply any one or more of the plaintiffs' defenses to the ninety day statute of limitation

set forth herein under III A 4 (a) and (b). The respondents never gave the plaintiffs-appellants notice of the time within which judicial review must be sought (J.A. 401; 10-25). This is all the more egregious because "The City" gave this notice to other persons who had less substantial and significant interest at risk (J.A. 409: 1-10; 500; 501), and also because the plaintiffs-appellants requested this information and never received an answer (J.A. 401: 8-25). The fundamental basis of "The City's" duty to notify plaintiffs is the fact that they knew that plaintiffs' vested and substantial rights were involved. They also knew that the plaintiffs were entitled to proceedings that were adequate to meet constitutional standards including notice of the decision and the time within which to seek judicial review and the consequences for failure to do so in a timely manner. This constitutes a flagrant denial of plaintiffs' due process and equal protection constitutional rights and treats plaintiffs and contiguous property owners as (NIMBY's)[4] and second class citizens (J.A. 404: 25-28; 405: 1-2) (J.A. 407: 1-6) (J.A. 409: 1-10) (J.A. 411: 3-12) (J.A. 415: 16-26).

Today, in light of contemporary judicial approval of the doctrine of "tolling," in truncated statute of limitation cases and by the Legislature's intent implicitly as well as explicitly being expressed by the amendments of 1991, recognizing these cases; and based on analogy to the reasoning for the requirements of §1094.6(f) that the local agency shall provide notice to the aggrieved person that the time within which judicial review must be sought, this Court should apply the same standard to §66499.37 of the "S.M.A.", and a fortiori to a non-party contiguous owner- objector who gave notice of their interest even before the hearings and the decision and were eclipsed from all their property and constitutional rights.

---

[4]An uncomplimentary nickname used by land developers and land-use governmental agencies; an acronym consisting of the first letter in "not in my back yard."

E. STATUTE OF LIMITATIONS DEFENSE IS NOT A BAR TO NULL AND VOID PROCEEDINGS, DECISIONS AND LAWS.

The plaintiffs have alleged that their constitutional rights to due process was denied to them by "The City" (J.A. 416: 7-24) and by the provisions of Government Code §66499.37 of the "S.M.A." containing a truncated statute of limitations (infra, III D, pp. 38-42). Plaintiffs have also alleged that "The City" in diverting the traffic by the means of relocating the gate engaged in traffic management (J.A. 412: 1-12) and thus acted without jurisdiction (J.A. 484: 16-26). In cases where the government denies procedural or substantive due process or acts without jurisdiction, its acts are a nullity and the statute of limitation cannot be raised as a bar. Proceedings, decisions and laws that are null and void can be collaterally attacked in any proceeding and at any time subject only to the defense of laches. City and County of San Francisco v. Padilla, 23 Cal.App.3d 388, 400 (1972).

Even if the government required as a condition, certain procedural limitations to challenge unconstitutional laws and they are reasonable, these limitations will not prevent an aggrieved person from pursuing them if it is reasonable under the circumstances of the case, that notice of them be given or if the reason for the untimely filing is the essence of the complained of constitutional deprivations.

The Fourteenth Amendment to the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The California Constitution also contains due process guarantees (Art. I, §§7, 15).

The Due Process Clause has been interpreted as a limitation upon the legislative as well as the judicial and executive branches of the government, thus preventing arbitrary and unreasonable legislation. This aspect of the subject is known as substantive due process, to distinguish it from procedural due process. Adamson v. California, 332 U.S. 46 (1947).

The Horn v. Ventura (24 Cal.3d 605 (1979)) case involved proceedings between a contiguous land owner and the County

in which the owner objected to the approval of a new subdivision because it would in part increase both traffic congestion and air pollution. The court held at page 616

> "whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs."

The Horn court went on to say at page 617

> "However, where, as here, prior notice of a potentially adverse decision is constitutionally required, that notice must, at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interests" (citations omitted).

The Horn court responded to the defendant's argument based on provisions of the "S.M.A." on page 616 in part as follows:

> "It is a sufficient response to note that the due process requirements discussed herein are not rooted in the statute but are compelled by the stronger force of constitutional principle."

It should be noted at this point that it would not have imposed an insupportable additional administrative burden on "The City" to add to the "notice" they mailed out to contiguous owners, the truncated time limits for judicial review, as provided for in their own ordinance (§1.16.010(f)) (S.A. 500; 501) to persons with interest much less substantial and significant than plaintiffs-appellants.

"The City's" "notice and hearing" were inadequate to meet due process standards where plaintiffs' fundamental vested and constitutional rights are substantially and significantly affected.

The process did not provide for a meaningful notice or a fair pre-deprivation hearing nor post hearing due process.

The "notice" received and the "hearing" provided obviously led to no satisfaction of plaintiffs' due process rights.

Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use procedures which have been traditionally associated with the judicial process. The considerations of what procedures due process may require must be determined by examining the precise nature of the government function involved as well as the private interests that have been affected by the governmental action. Mathews v. Eldridge, 424 U.S. 319 (1976).

In the recent case of Traverra* v. People ex rel Dept. of Transportation, 9 Cal.App.4th 477, 1647d, modified (1992), the Court determined that a statute failing to provide for any pre or post hearing to owners of billboards is unconstitutional. A petition for review is currently pending in the California Supreme Court. [Case was reversed by the California Supreme Court on grounds that are not applicable to the case at bar.]

It is clear from the record in the case at bar: the nature of the proceedings that plaintiffs were subjected to, the substantial and significant interest plaintiffs were deprived of, and the minimal burden that remedial procedures would have caused, that the plaintiffs were denied their procedural and substantive due process and equal protection rights.

The most limited standard of judicial review must look into the matters of fundamental authority and abuse of discretion, and based on the Superior Court's ruling, it did neither. A person aggrieved has a right to a judicial determination of constitutional questions and of other questions of law. Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 325 (1941). Where a constitutional right is involved in the factual determination, the courts must make an independent examination. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[*Case was reversed by the California Supreme Court on grounds that are not applicable to the case at bar.]

Where the facts relate to the jurisdiction or fundamental authority of the administrative agency, either under the constitution or the statute, judicial review of that determination is also required. Western Air Lines v. Sobieski, 191 Cal.App.2d 399, 406 (1961).

The Superior Court assumed that plaintiffs' W.O.M. action was to be reviewed on the basis of a quasi-legislative standard. The proceedings between the defendants-respondents is without question quasi-judicial. Where "The City" simultaneously acts in a quasi-judicial and quasi-legislative capacity, even ordinary facts must be reviewed under the substantial evidence test. Mountain Defense League v. Board of Supervisors, 65 Cal.App.3d 723, 729 (1977). Plaintiffs' identified private interests were never noticed, or even considered at the hearing involving "The Developer's" application for a new subdivision. As to plaintiffs' interest, there was never any notice or hearing! How can the defendants claim that plaintiffs had a constitutionally adequate pre-deprivation hearing? It is beyond any doubt that the decision as to plaintiffs is null and void and therefore is subject to collateral attack.

"The City's" action relating to its traffic management decision transgresses "The City's" authority, which under Vehicle Code §21 has been preempted by the state and any delegation of this power must be expressly, and not impliedly, authorized by the state Legislature. "The City's" action was without jurisdiction and is void. In such a case, the court does not review the action for abuse of discretion because there is no discretion to abuse. Association for Retarded Citizens v. Department of Developmental Services, 38 Cal.3d 384, 391 (1985). Because "The City" acted without jurisdiction, its decision is subject to collateral attack. City and County of San Francisco v. Padilla, 23 Cal.App.3d 388, 400 (1972). The Padilla case also holds that the agency may act in excess of its jurisdiction by the way it proceeds to or during the hearing resulting in a prejudicial abuse of discretion because it had not proceeded as required by law. "Conduct of the proceeding" can result in the agency acting in excess of its jurisdiction to the same effect of the agencies acts without jurisdiction in its

fundamental sense. In either case, the agency's decision would be subject to collateral attack. Any proceedings attacking a void decision can be made at any time, and will not be subject to the bar of the statute of limitations, only to laches.

APPELLANTS' REPLY BRIEF

At pages 36-43:

D. TRUNCATED LIMITATION PERIODS WITH A NONCLAIM CLAUSE REQUIRE NOTICE TO APPELLANTS TO BE CONSTITUTIONAL.

The SMA provides for notice to adjacent landowners "whenever approval of a tentative map will constitute a substantial or significant deprivation of the property rights." Government Code §66451.4. The nonclaim provision of said §66499.37 provides in substance the barring of all claims but, by its literal terms, does not bar claims for "damages or compensation." The SMA does not contain any provision which provides the same type of notice contained in C.C.P. §1094.6(f). "The City's" ordinance for the "Time Limits for Judicial Review," Section 1.16.010, provides notice to the party of the time within which judicial review must be sought. However, said section only applies to officers or employees of "The City" and applicants for permits, licenses and retirement benefits, but not for adjacent landowners, 3(J.A. 500, 501).

Appellants did not receive a predeprivation notice or hearing, notice of the decision, a notice as to the time in which to seek judicial review, nor a notice of the nonclaim provision. As known adjacent landowners, their federal and state due process and equal protection rights were denied them, as well as their rights to just compensation.

"The City" was under an affirmative duty by virtue of the federal and state constitutions, statutes and case law to provide appellants with actual and meaningful notice of their rights including a fair predeprivation hearing. People v. Swink, 150

Cal.App.3d 1076, 1079, 1101, 1102 (1984); Minor v. The Municipal Court, 219 Cal.App.3d 1541, 1549, 1550, 1551 (1990).

In 1988 the Supreme Court of the United States held in a 8 to 1 decision that a nonclaim statute violated the due process clause. Where the creditor was known to have a protected property interest and his location was known or reasonably ascertainable, they were entitled to actual notice of the fact that the statute could adversely affect a creditor's protected property interest. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988).

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. James v. Oakland Traction Co., 10 Cal. 785 (1909).

The modern view as to the validity, under the Federal Constitution, of prejudgment attachment, garnishment, replevin and like procedures authorizing summary possession of property, is represented by the Fuentes v. Shevin case at 407 U.S. 67 (1972) and the Tulsa case. Courts in a number of cases have held that the state statutes authorizing the prejudgment seizure of personal property without notice to the owner, and without affording him an opportunity to be heard prior to the seizure, violated procedural due process standards under the federal Constitution. There are exceptions but none are applicable in the case at bar.

Prior to an action that will affect an interest in life, liberty, or property, a State must provide "notice" reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

For further application of these principles see: Probate Code §9001(a) and §9050; Adams v. Egley, 338 F.Supp. 614 (1972) (summary repossession under Commercial Code); Randone v. Appellate Department, 5 Cal.3d 536 (1971) (attachment - C.C.P. §537 held unconstitutional); Blair v. Pitchess, 5 Cal.3d 258 (1971) (claim and delivery law violated due process).

If Miranda is required to be warned, why not the adjacent landowners? Miranda v. Arizona, 384 U.S. 436 (1966).

Even a strong public policy in favor of the building industry and land planners still requires them to accomplish their laudable goals commensurate with the constitutional rights of the adjacent owners.

Respondents' confidence in the recent case of Patrick Media Group, Inc. v. California Coastal Commission, 9 Cal.4th 592 (1992), is misplaced. The Patrick Media Group (PMG) was in privity with applicant and the lessee-assignor and also made a demand for compensation and was notified of the denial. PMG was thus a party and had notice of the predeprivation proceedings. Further, the Public Resources Code and §§13106, 30801 of the California Coastal Commission Regulations, provide for a post-hearing procedure.

The case is decided on the bases of res judicata and the balance of the opinion contains dictum. It also should be noted that the PMG court would in all fairness permit PMG to file within the period allowed for judicial review, starting not with the decision, but from the time they received actual notice. Also the court expressly states that United States v. Dickinson, 331 U.S. 745 (1947) and Pierpont Inn v. State of California, 70 Cal.2d 282 (1969) would be followed if, as in the case at bar, the tolling, or suspension, of the statute and the estoppel of a defendant to raise the statute was a defense. On page 615 the PMG court indicated "where the plaintiff, without fault, is unaware of a cause of action or of its extent, or where fraud or other misconduct by the defendant has caused the plaintiffs' inaction, they would permit the 'late filing.'"

Presenting Jamul v. Board of Supervisors, 231 Cal.App.3d 665 (1991) and California Coastal Commission v. Superior Court (Ham), 210 Cal.App.3d 1488 (1989), are also sound decisions but are not authority for the respondents' arguments because they are also distinguishable from the case at bar for the same reasons that the Rossco and PMG cases are distinguishable.

The non-claim provisions of the SMA and "The City's" subdivision ordinance are unconstitutional for their failure to

provide for actual notice for a predeprivation adjudicatory proceeding.

There is no contest in balancing the policy considerations in support of the statute of limitations, against the policy considerations of an individual's rights guaranteed by the Constitutions. Constitutional rights prevail.

E. STATUTE OF LIMITATIONS DEFENSE IS NOT A BAR TO NULL AND VOID PROCEEDINGS, DECISIONS AND LAWS.

That based on the facts alleged in the complaint, appellants have provided the citations to authority that support their contentions that proceedings, decisions and laws that are void may be collaterally attacked (A.O.B. 42-47). The respondents in their responses and on the admitted facts cite only one case to refute appellants' authority and that case is not applicable to the facts, and by implication is support for appellants' position.

In the case at bar, the complaint alleges that "The City" was without fundamental jurisdiction of both the person and the subject matter; that the proceedings and the decision were void; and that the statute and ordinance in question were unconstitutional and void. These allegations are supported by facts.

In Hawkins v. County of Marin, 54 Cal.App.3d 586, 593 (1976), the court cites authority with approval, that involved judgments that were void due to jurisdictional defects apparent on the face of the record. The court then went on to say that: "The doctrine of these cases should not be extended to those involving the review of conditional use permits allegedly not issued in conformity with statutory requirements." Again, the court was right, but those are not the facts alleged in the complaints, and on the face of the record. The record shows that the tribunal was without jurisdiction in the fundamental since, and just that they made an error.

The respondents cite two other cases as support for their argument in unrelated sections of their brief. They do relate to the issue of the inapplicability of the statute of limitations as a bar to a void proceeding and thus will be dealt with. They cite

the case of Allis-Chalmers v. City of Oxnard, 105 Cal.App.3d 876 (1980) for the proposition that a "short statute of limitations even against the civil rights claim" is a bar (R.B. 31-32). Allis-Chalmers received notice of the assessment proceedings, attended and made objections. The taxing tribunal had jurisdiction, and Allis-Chalmers had notice and a hearing. Because the facts alleged in the complaint at bar are totally distinguishable on all significant facts, the case does not support respondent's argument.

The Respondents in another section of their brief cite the case of City of Baldwin Park v. Stouskus, 8 Cal.3d 563 (1972), for the proposition that: "may not untimely attack special assessment in later proceedings" (R.B. 14). They fail to point out that the claimant in that case had notice of the proceedings, attended the hearing, and made an objection on the ground of disproportionality between the tax benefit and the tax burden. The court correctly held that the claimant under those circumstances could not collaterally attack the assessment, even under the new ground based on the Constitution.

In Justice Brennen's opinion he captures the essence of "due process" in land regulation cases as follows:

> "After all, if a policeman must know the constitution, then why not a planner.?" (Page 621, FN 26.)

The record in the case at bar shows that the proceedings, decision and laws were null and void, thereby depriving the tribunal of fundamental jurisdiction. Accordingly, the statute of limitations cannot be a defense in this case.

APPELLANTS' PETITION FOR REHEARING

At pages 31-33:

VI.
ASSUMING, *ARGUENDO*, THAT THE PROCEEDINGS, DECISIONS AND LAWS ARE SUBJECT TO THE STATUTE OF LIMITATIONS DEFENSE, THE APPELLANTS HAVE RAISED NUMEROUS REASONS, ANY ONE OF WHICH WILL BAR ITS USE

The Appellants' Opening and Reply Briefs set forth in detail the substantive and procedural bars of suspension, estoppel and tolling. It also demonstrates the limitations of the statute of limitations defense being raised by demurrer rather than by an answer. These will not be repeated, except to call the Court's attention to our Supreme Court's premier case of Pierpont Inn v. State of California (1969) 70 Cal.2d 282 (Pierpont). Because of the continuing and accelerating nature of the damages and the City having full knowledge of Appellants' asserted rights even prior to their decision and thereby not be prejudiced, makes that case a perfect one to apply the doctrine of "judicial suspension" (claims based on nuisance-type damages also frequently employ this concept). Curiously, the Court failed to address these issues, probably because of a misunderstanding of the facts. The Court's failure to address these issues as well as the other bars covered in their briefs has resulted from a misunderstanding of the facts as alleged in the Complaint and does an injustice to Appellants.

The City approved and adopted a traffic regulation for public safety in relation with its approval of Fieldstone's subdivision.[5] Under the Vehicle Code and the Subdivision Map

---

5 The mere fact that the City approved and adopted a traffic regulation, (not within the subdivision) on its public roads and for the laudable purpose of public safety, contemporaneously with its subdivision land regulation and zoning proceedings does not nor can it be claimed as an immunity under the S.M.A. In certain cases the Courts can require compliance with the act as

Act, this required a minimum of at least two more notices and hearings. No such notice was given and no such hearing was had. The City traffic regulation, was adopted by stealth, it is "D.O.A.!"

That being the case, it would be unnecessary to develop the basis for the necessity for at least two more notices required by the Constitution (also they were addressed in Appellants "Fatal Constitutional Flaws" infra). Accordingly, Appellants will merely identify them for the Court's convenience.

The facts alleged require a predisposition proceeding; notice and hearing that are mandatory. For an explanation of the constitutional basis of this requirement and the criteria that must be adhered to, see the Horn case, supra.

The United States Supreme Court in 1988 held in an 8 to 1 decision that the employment of a truncated statute of limitations, (e.g. Government Code §66499.37) requires actual notice to be constitutional. Tulsa v. Pope, supra.

It should also be noted that the City, in its own ordinance (§1.16.010(f)), provides for notice of the entry of the decision and the time limits for judicial review for a class of persons with interests much less substantial then Appellants. Also, the Code of Civil Procedure §1094.6, in like situation, required the same type of notice (Appellants' Opening Brief at 38-42; Appellants' Reply Brief at 36-40).

---

procedural condition to raising the constitutional issue such as the Rossco Holding, Inc. v. State of California (1989) 212 Cal.App.3d 642 (Rossco). (Appellants' Reply Brief 30-31, 40). These cases are all distinguishable on the material facts, which stated briefly are: (1) Appellants are not applicants or parties; (2) no notice of a pre-deprivation hearing; (3) no waiver; (4) excused from exhausting administrative remedies; (5) excused from filing for judicial review; (6) the taking was not a regulatory "taking" but a "physical taking"; (7) Appellants filed for judicial review in a timely fashion from an adjudication proceeding; (8) the proceedings were constitutionally flawed and thus null and void; (9) Appellants raised good and valid defenses as a bar to the statute of limitations defense; (10) the record and the applicable law make it just unfair to bar Appellants' meritorious constitutional claims.

The fact that the City is required to provide all these notices does not impose upon them an insupportable administrative burden or cost. They merely add to the notice of public hearing, whatever additional notices, that are required by the law (and also in all fairness). This is "duck soup" with today's word processors. The Subdivision Map Act even provides for the developer to pick up the cost, if any.

It is manifest from the record herein that this Court owing to a mistake of law and a misunderstanding of the facts, affirmed the trial Court's sustaining of the demurrer to the three Causes of Action in Count III of the Complaint. The injustice done to Appellants is profound. This is particularly painful because it is seriously doubted that the original decision is correct.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At page 23:

F. ASSUMING, *ARGUENDO*, THAT THE PROCEEDING, DECISIONS AND LAWS ARE SUBJECT TO THE STATUTE OF LIMITATIONS DEFENSE, THE APPELLANTS HAVE RAISED NUMEROUS REASONS, ANY ONE OF WHICH WILL BAR ITS USE.

1. Without waiving the other "bars" to the statute of limitations defense, the Appellants call the Court's attention to Pierpont, infra. The material facts and issues are the same as in the case at bar, and the doctrine of "judicial suspension" being based on good logic and reason, the case is dispositive of the putative defense of the statute of limitations[11].

---

11 Footnote omitted in printing.

2. The Nestle case, infra, had earlier held "that every repetition of the wrong may create further liability," thereby indicating that in continuing injury cases that statute of limitations may never be a defense so long as they are continuing.

III. DENIAL OF THE CIVIL RIGHTS CAUSE OF ACTION §1983 INCLUDING INVERSE CONDEMNATION AND THE CAUSE OF ACTION FOR A WRIT OF MANDATE BASED THEREON

APPELLANTS' OPENING BRIEF

At pages 33-34:

1. THE TRIAL COURT ERRONEOUSLY SUSTAINED DEFENDANTS' DEMURRER BY FAILING TO APPLY FEDERAL LAW TO DETERMINE WHETHER THE COMPLAINT ALLEGES A GOOD CAUSE OF ACTION UNDER THE FEDERAL CIVIL RIGHTS ACT.

In the case of Gomez v. Toledo, 446 U.S. 635 (1980) the court stated on page 577,

> "By the plain terms of §1983, two -- and only two -- allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167 . . ."

Plaintiffs-Appellants have made both of the required allegations (J.A. 416: 7-17). Further, there is no basis to impose on the plaintiffs an obligation to anticipate "matters constituting an avoidance or affirmative defense." The Gomez court in its unanimous opinion also stated at page 576,

"Section 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.' This statute, enacted to aid in 'the preservation of human liberty and human rights' . . . reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' As remedial legislation, §1983 is to be construed generously to further its primary purpose." (Citations omitted.)

In the case of Bach v. County of Butte, 147 Cal.App.3d 554 (1983), the court held that the state courts of California should apply federal law to determine whether a complaint pleads a cause of action under the federal Civil Rights Act sufficient to survive a general demurrer. The headnotes 1 to 8 both inclusive contain a succinct summary of the applicable law the California courts should use in passing on a general demurrer to a cause of action under the federal Civil Rights Act.

In light of the clear statement of law and the facts alleged in the pleading in question (J.A. 393-437), plaintiffs-appellants have pleaded a cause of action.

APPELLANTS' REPLY BRIEF

At pages 24-29:

C. THE APPELLANTS HAVE BEEN DENIED THEIR FEDERAL AND STATE RIGHTS AND THE TRIAL COURT ERRONEOUSLY SUSTAINED THE DEFENDANTS' DEMURRER. THE TRIAL COURT ALSO ERRED BY FAILING TO APPLY THE CORRECT STANDARD OF JUDICIAL REVIEW TO EXAMINE THE MANDAMUS ACTION AND ABUSED ITS DISCRETION BY NOT ALLOWING LEAVE TO AMEND.

The public hearing conducted by "The City" was three hearings in one. The first related to the action taken by "The City" to control traffic. These acts were beyond their authority and jurisdiction.

The Subdivision Map Act, Government Code §§66410-66499.37, SMA does indeed provide for the regulation, control of the design and improvement of subdivisions with consideration for their relation to the adjoining areas. It is obvious that these and other physical requirements in the plan of the subdivision are intended for intramural application only (§66411). Additionally, the SMA cannot be used to emasculate the Vehicle Code §21 which has preempted the field of traffic control unless "expressly provided" by the Legislature. The Vehicle Code does provide for legal means to engage in limited traffic control under certain conditions. However "The City" neglected or elected not to do so and it was not done in accordance with requirements of the law. Further, traffic control requires a general plan amendment to implement it and Government Code §§65351, 65357, requires "The City" to provide notice and an opportunity for the public to become involved in amendments to the general plan. No such notice was given to appellants. "The City's" decision relating to traffic control is void. City of Poway v. City of San Diego, et al., 229 Cal.App.3d 847 (1991).

The second hearing was appellants' "pre-deprivation hearing," and this also being without jurisdiction, notice, or a hearing is void. Horn v. County of Ventura, 24 Cal.3d 605 (1979); Tulsa v. Pope, etc., 485 U.S. 478 (1988).

The third hearing was the public hearing on "The Developer's" application for approval of the tentative map. Plaintiffs-appellants were strangers to those proceedings and appeared as "witnesses" for the tribunal, to better enable them to make an informed decision. This hearing was the culmination of years of negotiations between "The Developer's" staff and "The City's" staff. The staffs, in lock-step then gave a choreographed presentation. It was an impressive show, 2(J.A. 399: 1-22). The public had been duly notified of this hearing and appellants attended as part of a "S.R.O." audience. Both the respondents by their staff made a lengthy and extravagant presentation, 2(J.A. 399: 1-9).

The public then was permitted to provide the hearing officers their opinions as to the new subdivision. These presentations were limited and tightly controlled, 2(J.A. 399: 10-28; 400: 1-18). Thereafter the respondents were given unlimited time to answer the public objections, 2(J.A. 400: 19-22). At no time were the appellants given an opportunity to cross-examine the witnesses of the respondents, nor any time to even argue in reply, 2(J.A. 400: 22-25). No notice of the decision or of anything else was ever given to appellants, 2(J.A. 403: 9-25; 404: 8-19).

The hearing, as a "Town Hall" public hearing, has not been objected to by appellants except as effected by the perverted use of: (a) the adoption of a traffic management plan; and (b) used in lieu of a pre-deprivation proceeding, together with the effect of the nonclaim statute of limitations. As to these matters the hearings "were a sham and a fraud on the plaintiffs," 2(J.A. 405: 3-26). The allegations in the complaint present a classic case of arbitrary adjudicative proceeding violative of both the federal and state constitutions.

"From a pleading standpoint, plaintiffs have thus adequately described a deprivation sufficiently to require procedural due process protection." Horn v. City of Ventura, 24 Cal.3d 605, 615 (1979).

Where prior notice of a potentially adverse decision is constitutionally required, that notice must at a minimum be reasonably calculated to afford affected persons the realistic opportunity to protect their interests.

Justice Brennan's opinion expresses this thought in the following quotations:

> "The States should be free to experiment in the implementation of this rule (procedures or form of remedy) provided that their chosen procedures and remedies comport with fundamental constitutional command." (Parenthesis added and citations omitted.) (Page 660.)

> "But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches." (Page 661.)

> "That guarantee was not designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be born by the public as a whole." (Page 656.)

1. <u>The complaint alleges a good cause of action under the Federal Civil Rights Act</u>.

Respondents do not take issue with the points and authorities in appellants' opening brief (pp. 33-34) in support of their position that under federal law, appellants state a good cause of action. However, they now argue that appellants do not have a protected vested interest, and even if they did, it is barred by the statute of limitations.

The appellants have a cognizable, protected, vested interest. The respondents cite Love v. Navarro, 262 F.Supp. 520 (C.D.

Cal. 1967), as being "remarkably similar." Nothing could be further from the truth. The Love case holding is a pure and simple matter of the complaint in that case not alleging any infringement of the federal Constitution.

Appellants' case does not rest on a "vested right in zoning" but on the fact that they have a vested right in possession and use of their property, infra pp. 13-18. There is no need to claim a vested right in zoning when land regulation decisions cause physical interference or invasion of your protected vested property rights. The airport, highway, noxious odors and other actual and constructive physical "taking" cases are examples of not needing a vested right in zoning to recover compensation if there is a "taking."

The reason why the statute of limitations is not a bar to appellants' civil rights action are the same as has been set forth in particularity in their opening brief, pages 15-26, and infra 1-4, and supra 34-43, and does not merit further discussion or authority.

Thus, neither of respondents' arguments have any legal or factual support. The appellants have alleged a good cause of action that is not barred under the federal Civil Rights Act.

. . .

At pages 35-36:

3. <u>The complaint alleges a good cause of action in mandamus</u>.

The appellants' mandamus action is an alternative remedy to the causes of action I and II. It also served as a procedural device to challenge the constitutionality of the
proceeding and decision of "The City," 2(J.A. 410: 7-15). The mandamus action, per se, is based on the allegations of the complaint which if true would establish that the final map proceedings were an adjudicative, discretionary function and "The City" was not required to approve the tentative map, 2(J.A. 410: 17-28; 411: 1-2; 411: 13-19; 416: 18-24). Appellants filed their complaint within forty-five days from the approval of

the final map, 2(J.A. 408: 25-28). Appellants allege that the final map was not mandatory, 2(J.A. 401: 26-28; 402: 1-28; 403: 1-8). "The Developer" did not have a "vested right", 2(J.A. 407: 11-28). The SMA provides that a final map shall be disapproved for the failure of meeting the requirements of the statute or ordinance, the only qualification being that the requirements or conditions existed at the time of the approval of the tentative map, 2(J.A. 408: 1-9). The SMA further provides that the map shall also be denied if it is ". . . likely to cause substantial environmental damage", 2(J.A. 408: 10-14). The complaint alleges that it will cause substantial environmental damages, 2(J.A. 408: 15-20). Appellants allege that the mandamus action is necessary to protect their rights, 2(J.A. 406: 9-15) and also that an actual controversy exists, 2(J.A. 419: 4-7).

The respondents' objections are based on appellants' Second Amended Complaint. The respondents' demurrer to said complaint was sustained, but the appellants were given leave to file their Third Amended Complaint, 3(J.A. 631).

All three causes of action stated in the Third Amended Complaint state good causes of action and none are barred by the statute of limitations.

ATTACHMENT TO THE SUPPLEMENTAL PETITION FOR REHEARING:

TOPICAL TABLE, WITH INDEX TO CITATIONS IN THE JOINT APPENDIX THAT SUPPORT APPELLANTS' CAUSES OF ACTION

I.
INVERSE CONDEMNATION VS. CITY

II.
NEGLIGENCE vs. FIELDSTONE

A. Site Preparation

B. Complicity With City

III.
WRIT OF MANDATE VS. CITY

A. Federal Civil Rights Violated

B. California, Constitutional Based, Abuse Of Administrative Proceedings

C. Review Of Administrative Tribunals (City Council) Action, Re: Land Regulation And Zoning In Connection With Proceeding For Proposed Subdivision

I.
INVERSE CONDEMNATION vs. CITY

To state a cause of action for inverse condemnation, the complaint must allege facts to show: (a) taking; (b) for public use or purpose; (c) private property; (d) without just compensation. The Harding case[1] is substantially the same in all material respects. It is controlling. Appellants' Complaint complies with its requirements.

Subject	Citation
Appellants' home is private property	2(J.A. 250:24-28); 251:1-2)
The City is a public entity.	2(J.A. 2:22-24)
Fieldstone's original plan and its application requested the access to its subdivision be located on Alicante Road	2(J.A.:13-15)
The access was changed by the City to Corté de la Vista "for traffic safety purposes."	2(J.A. 252:13-26)
The relocation of "the gate" was the means the City used to regulate traffic.	2(J.A. 253:4-28; 254:1-8)
The relocation of "the gate" was based on consideration of public safety for the public at large, "and not for any private purpose or use."	2(J.A. 253:4-8)

---

1 Cases that have been cited in the Petition For Rehearing will be cited herein as if this Petition is merely a supplement to it with newly developed and discovered material.

"The City's" requirement that "The Developer" relocate the access to the project for ingress and egress ("the gate") (N.B. "the gate" is shorthand for the relocation of the access for public safety.	2(J.A. 253:9-10)
"The gate" was for the express purpose of regulating traffic, and as such, serves a public purpose and use."	2(J.A. 253:10-13)
Traffic regulations was the public "improvement."	2(J.A. 253:13-14)
The act of relocating "the gate" directly and wrongfully diverted the heavy traffic from Alicante Road and re-routed it to Corté de la Vista thereby increasing, unreasonably and excessively, the volume of traffic, and destroying the residential environment of the plaintiffs' home. "The gate" will be constructed in its new location by "The Developer" as authorized and directed by "The City" and subject to its approval, and said gate will be accepted by "The City" by "The City's" integrating "the gate" into its public roadways.	2(J.A. 253:14-22)
That both Alicante Road and Corté de la Vista are public improvements and part of the public roads owned and maintained by "The City." The relocation of "the gate" by "The City's" affirmative action was not only by its substantial participation, but the sole and direct cause of creating and causing the condition that will result in the damaging and/or taking plaintiffs' property by the trespass, nuisance and air pollution more fully described elsewhere in plaintiffs' complaint.	2(J.A. 253:23-28; 254:1-2)

As a direct result thereof, the flow of traffic will all enter and exit on Corté de la Vista which is a public street and not a private driveway, and integrated into the public streets on the admitted grounds for the public safety of the community as a whole and will dramatically and adversely increase the volume of traffic and change the residential environment.	2(J.A. 254:3-8)
That "The City's" taking is official governmental action ..."	2(J.A. 254:27-28)
As a direct and necessary result of the aforesaid governmental action, the noise, dirt, odor, air pollution, flashing headlights and vibrations cause, and will continue to cause, a substantial interference with the use and enjoyment by plaintiffs of plaintiffs' homes, the loss of reasonable investment-backed expectations, and a diminution in its primary use and value.	2(J.A. 255:4-10)
Plaintiffs have received no compensation for their damages, nor has "The City" instituted eminent domain proceedings.	2(J.A. 259:3-5)
Deprivation of Appellants' constitutional rights.	2(J.A. 259:6-12)
"The City," by its decision and failure to justly compensate the plaintiffs, has deprived the plaintiffs of their constitu-tional right to a jury to determine their damages.	2(J.A. 259:13-16)

II.
NEGLIGENCE vs. FIELDSTONE

Both causes of action against Fieldstone are based on negligence, causing pollution and nuisance-type damages. The essential elements that must be alleged in the Complaint are: duty; breach of duty; a causal connection between the acts and/or omissions and the damages; and damages. Appellants' Complaint satisfies these requirements nor has any issue been raised as to their adequacy.

The Respondents and the Court's sole defense relies on the Civil Code section 3482. Said section provides, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

The statute cannot be read without viewing it with the "judicial gloss" that has been added. Courts have severely limited the application of the statutory immunity by holding that it cannot be pleaded in justification of acts which would otherwise constitute a nuisance unless the act is authorized by the express terms of the statute relied on, or, "by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very acts which occasions the injury." Hassell v. San Francisco (1938) 11 Cal.2d 168, 171.

To say that the Subdivision Map Act, by its "express terms" authorized the City to unlawfully engage in traffic management without jurisdiction and provide Fieldstone (not in privity with the City) with a statutory immunity is contrary to the letter and spirit of the Hassell case.

A fair reading of the statute does not permit this result nor does Fieldstone have any standing to invoke this immunity. Based upon the allegations in the Complaint, this defense cannot be raised by demurrer. The manner in which the acts and omissions occurred and the nature and extent of the injuries to Appellants are not only unreasonable and as a result negligence, but they were willful. Lacher v. Superior Court of Orange County (1991) 230 Cal.App.3d 1038.

Subject	Citation
May 10, 1990, notice given to Fieldstone of objections to "relocation of gate."	2(J.A. 262:5-12)
Fieldstone did not object to the "relocation" or pursue remedy.	2(J.A. 262:13-23)
Fieldstone's negligent manner.	2(J.A. 262:24-27)
Site construction to take a year and thereafter several years to complete the project.	2(J.A. 264:14-20)
Site construction damage to end; the damage due to the increased volume of traffic will be continuing and permanent.	2(J.A. 264:26-28; 265:1-2)
The volume of traffic will increase over 1,300 "trips" a day, funneled to a point across the street from Appellants will directly cause Appellant unreasonable damages.	2(J.A. 265:13-28)
The view and ocean breeze is still there but cannot be enjoyed.	2(J.A. 266:4-13)
The nuisance is based on fault is unreasonable.	2(J.A. 267:9-12)
Fieldstone's acts and omissions causing the pollution and nuisance damages described with evidentiary detail in the Complaint was willful, oppressive and malicious.	2(J.A. 267:26-28; 268:1-3)
Section 3482 of the Civil Code does not provide a statutory immunity to Fieldstone for their unreasonable acts and damages to Appellants.	2(J.A. 269:15-24)

III.
WRIT OF MANDATE vs. CITY

A. Federal Civil Rights Violated

In the case of Gomez v. Toledo (1980) 466 U.S. 635, the court stated on page 577:

> By the plain terms of §1983, two -- and only two -- allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Paper, 365 U.S. 167.

Subject	Citation
"Plaintiffs are citizens of the United States..."	2(J.A. 395:6)
"The City is a public entity..." and as such, is a person under the civil rights law.	2(J.A. 396:4,5)
The City acted under color of state law.	2(J.A. 397:10-17)
The Public Hearing was a sham.	2(J.A. 399:10-22)
One-sided hearing.	2(J.A. 400:19-25)
The notice to the multi-faceted hearing was defective; neither the hearing or the notice conform to the standards of the "due process" clause of the Federal or State constitutions.	2(J.A. 404:20-24)
Appellants were deprived of their Federal "due process" and "equal protect" rights under the Federal Constitution.	2(J.A. 404:25-28; 405:1-26)

Appellants did not receive reasonable notice or opportunity to be heard prior to the deprivation of its property rights and in violation of its civil rights.	2(J.A. 408:21-24)
Appellants' property and civil rights were denied them in violation of the City's duty.	2(J.A. 411:3-12)
The violations of Appellants' rights were caused by the City's acts and omissions under color of law and in violation of their constitutional rights.	2(J.A. 412-414:1-18) and 1(J.A. 415:4-21)
The City acted under color of state law and violated Appellants' rights as aforesaid causing Appellants damages and said acts are not isolated.	2(J.A. 416:7-28; 417, 418:6-26)
Appellants' right to possession and use of their property is based upon the positive law of California (see A.R.B. 13-17) and provides the substantive bases for its claim under the civil rights remedies law.	2(J.A. 411:10-12; 412-415:1-21)
Requirements for approval of the final map, makes it clear that the proceedings are adjudicative in nature.	2(J.A. 408-409:1-20)
Appellants were not parties to the proceedings between the Respondents.	2(J.A. 409:26-28)
The decision to divert traffic was in excess of the City's jurisdiction, counter-productive and inconsistent with the general, special and circulation plan.	2(J.A. 410:17-28, 411)

The City's diversion and funneling the traffic of the 132 project denied Appellants of their civil and property rights.	2(J.A. 415-418:1-18)
The City notice and agenda are prima facie evidence that the notice and hearing did not meet constitutional "due process" and "equal protection" standards.	2(J.A. 426-427)

B. California, Constitutional Based, Abuse Of Administrative Proceedings.

California Civil Rights, also includes the right to be free from arbitrary adjudicative procedure (Appellants' Reply Brief 29-35).

The law is set forth in Appellants' Reply Brief, pages 29-35. The facts to establish this cause of action will be found in the Complaint. More particularly, without limiting the generalities of the foregoing, see immediately hereafter, part III. C., the references to the facts in the Joint Appendix. It will show that Appellants have alleged that: "Respondents have proceeded without or in excess of jurisdiction"; have denied Appellants a "fair trial"; and has been guilty of "prejudicial abuse of discretion."

C. Writ of Mandate for Review of Adjudicative Administrative Proceeding and for an Order to Set Aside the Decision.

Subject	Citation
Tentative map approval was conditional and subject to the requirements of the final map, both of which items required "discretion."	2(J.A. 400:26-28, 401:1-7)

The City ordinance made it mandatory for them to provide a notice and hearing where you "shall be heard" and "discretion" shall be used.	2(J.A. 397:23-27); 2(J.A. 398:1-13)
DESCRIPTION OF THE HEARING	2(J.A. 399-407:1-10)

THIS CONCLUDES APPELLANTS' ABSTRACT OF THE KEY PROVISIONS SUPPORTING THEIR CAUSES OF ACTION.

APPELLANTS' PETITION FOR REHEARING

At pages 18-23:

III.

THE COURT OWING TO A MISTAKE OF LAW AND A MISUNDERSTANDING OF THE FACTS, ERRED IN REVIEWING THE TRIAL COURT'S ORDER SUSTAINING THE DEMURRER TO APPELLANTS' COMPLAINT FOR A WRIT OF MANDATE CAUSE OF ACTION RESULTING IN AN INJUSTICE TO THE APPELLANTS

C. The Federal and State civil rights' Causes of Action, having been addressed in Appellants' Opening Brief at 33-34, 34-37, and Appellants' Reply Brief at 27-33, as parts A and B, III of this Petition, Appellants will not repeat them.

The Court failed to address Appellants' civil rights Causes of Action, based on California law, except inferentially based on its reasons for concluding that Appellants' Causes of Action based on federal law were defective. Assuming, *arguendo*, that this is the case, it would still be prejudicial error because the federal Civil Rights law is not coexistential with California's law

in this regard. People v. Ramirez (1979) 25 Cal.3d 260; City and County of San Francisco v. Padilla (1972) 23 Cal.App.3d 388, 400.

It should be plain because it is explicit, that Appellants are not claiming the denial of zoning rights but "fundamental" vested, compensable property, and civil, and constitutional rights. This is also another example of Respondents' "facts" being in lieu of the facts in the Complaint. The Court's opinion on the bottom of page 16 and the top of page 17, demonstrate the results of using the wrong and impermissible "facts."

Respectfully, Appellants bring to the Court's attention their objection to the Court's opinion relating to the Third Cause of Action, a Writ of Mandate, which is the Third Cause of Action, included in Count III of the Complaint.

To the extent that the Court relies on the statute of limitations defense to support its opinion, "that the statute of limitations is applicable to Appellants' claims and that they have no basis to bar its operation," Appellants incorporate by reference their defenses in bar to the statute of limitations herein set forth.

Judicial review of the administrative decisions of the City is provided for in §§1094.5 and 1094.6 of California Code of Civil Procedure. It provides for, in substance, the Court to make inquiries whether the Respondents have proceeded: (a) without, or in excess of its jurisdiction; (b) whether there was a fair trial; and (c) whether Appellants received a fair trial. It goes on to say, "Abuse of discretion is established if the Respondent has not proceeded in the manner required by law...."

Because the case involves statutory construction of both jurisdictional and constitutional facts and further because Appellants are a "suspect class" and review involves not evidence but a demurrer, which assumes the facts to be true, the review should be *de novo* and the exercise of independent judgment on the "admitted" facts. Based on this criteria and standard of review, the undisputed facts will show that the City must be ordered to set aside its decision. Poway v. City of San Diego (1991) 229 Cal.App.3d 847; Selinger v. Redlands (1989) 216 Cal.App.3d 259.

The traffic regulation adopted by the City for public safety is null and void because it acted without jurisdiction and it is in conflict with the general plan, specific plan and its "circulation element." This Court held in Carstens v. City of Del Mar (1992) 8 Cal.App.4th 1642, 1653, in substance, that the state has preempted the field of vehicular traffic regulation and as such has no authority over vehicular traffic control unless provided for exceptions in Vehicle Code §§21100-21116. There is nothing in the record to support that the City acted pursuant to such delegated power, (and if they did, it could not be raised by a general demurrer). Further, the Complaint supports the conclusion that they invoked no exception and acted without any justification. The Subdivision Map Act cannot be construed as an amendment to the Vehicle Code, which by its terms must be strictly construed. Lacher v. Superior Court of Orange County (1991) 230 Cal.App.3d 1038, Lesher v. City of Walnut Creek (1990) 52 Cal.3d 531.

The Court is requested to take judicial notice of the City's Municipal Code and its ordinances. The City has not made any amendments to its General Plan and its specific Circulation Element relating to traffic since 1985. The Circulation Element classifies Alicante Road as a secondary arterial street, designed for a volume of traffic between 5,000 and 20,000 average daily trips. Corté de la Vista is classified as a local street ending with a cul-de-sac designed to handle no more than 500 average daily trips. This record shows that Fieldstone's subdivision will triple that number by the City's "traffic" easements as alleged in the Complaint 2 (J.A. 265) and is on its face, inconsistent with the General Plan and its specific Circulation Element. Even if the City had jurisdiction to engage in traffic regulation and complied with the appropriate procedures, it would have to be disapproved for failure to meet the requirements in Government Code §§66473, 66473.5 and 66474. Specifically, it is inconsistent with the City's General Plan and the related Circulation Element, and so is the design and improvements of the subdivision. Further, as alleged in the Complaint, the traffic will cause substantial environmental damages and cause health and safety problems. This being the case, the City, by virtue of

the above sections, as well as §20.16.020 of the City Code, must disapprove the traffic regulation. It is mandatory. It is also a clear case of abuse of discretion. The Complaint alleges facts to show that the City acted:

(a) without or in excess of its jurisdiction;
(b) did not provide the Appellants with a fair trial; and
(c) abused its discretion by not proceeding in the manner prescribed by law.

Government Code §§65860(a)(ii) also provides that all ordinances must be consistent with its General Plan and the Specific Plan. Also §65353 of the same code requires a notice (§65091) and a hearing to amend the General Plan and a "§65091(a)(3) notice" if it affects the permitted use of the real estate. The City's action was not authorized under the Government Code or the Vehicle Code and is void. The Vehicle Code also has mandatory requirement for notice and hearing. The Writ of Mandate is the appropriate remedy. Section 65860 of the Government Code does not permit a Court to rescue a zoning ordinance that is invalid *ab initio*. The Court should enter an order to issue a writ of mandate to compel invalidation. (The following additional citations are not necessary for the Court's consideration but are included for the Court's convenience.) Rumford v. City of Berkeley 91982) 31 Cal.3d 545; Poway v. City of San Diego (1991) 229 Cal.App.3d 847; Uhler v. City of Encinitas (1991) 227 Cal. App.3d 795; and the following Attorney General's opinions relating to the issues: 68-101 (1985), 68-108 (1985), 75-80 (1992), 56-274 (1973).

The Court having read Appellants' briefs, knows that it corroborates what has been said in this section of the petition (Appellants' Opening Brief at 34-38) and (Appellants' Reply Brief at 24-36). It also supports Appellants' allegations that the City, without jurisdiction in the fundamental sense as well as in excess of their jurisdiction because of the fatal flaws in the necessary proceedings, which was an abuse of discretion and not a fair trial. It was not a trial at all, it was a sham and a shame!

PETITION FOR REVIEW OF DECISION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT [DIVISION ONE] FILED JUNE 17, 1994

At pages 17-18:

C. THE COMPLAINT STATES THREE GOOD CAUSES OF ACTION IN ITS COUNT III AGAINST THE CITY, BOTTOM ON THEIR ABUSIVE "TAKING" AND DEPRIVATION OF APPELLANTS' EQUAL PROTECTION AND DUE PROCESS RIGHTS.

1. Federal civil rights action alleges that the City deprived the Appellants of a federal right under the color of law.

2. The California civil rights action:

a. Alleges that Appellants were subjected to "deprivatory governmental action" which deny them their "due process" liberty interest both in a fair and unprejudicial decision-making and with being treated with respect and dignity; "The right to be free from arbitrary adjudicative procedures"**;

b. The California law does not even require the showing of a property or liberty right in its initial due process analysis;

3. The Complaint for a writ of mandate seeks review of the administrative proceeding based on the deprivation of their constitutional rights:

a. The City acted without jurisdiction, unfairly and abusively:

(1) Abusive taking of an interest in their property without compensation;

(2) Denial of procedural due process;

(3) Denial of substantive due process;

** Footnote omitted in printing.

(4) Denial of equal protection of the law; and

(5) Denial of their civil rights guaranteed under both federal and state constitutions as fully set for in the Complaints.

b. The courts failed to use and apply the correct standard of review as to adjudicative, administrative tribunals[6].

c. The courts also failed to use and apply the correct standard of review to determine if the demurrers were sustained erroneously or, if in sustaining the demurrer without leave to amend, was an abuse of discretion[7].

Authorities in support for this heading and its subheadings are grouped together here for the Court's convenience[8].

---

6 Footnote omitted in printing.

7 Footnote omitted in printing.

8 Footnote omitted in printing.

REPLY TO ANSWER TO PETITION FOR REVIEW

At pages 4-12:

II.

THE LOWER COURTS IN THIS CASE OWING TO A MISTAKE OF LAW AND MISREADING OF THE FACTS COMMITTED PREJUDICIAL ERROR IN THE SELECTION OR APPLICATION OF THE STANDARD OF JUDICIAL REVIEW OF ADJUDICATIVE ADMINISTRATIVE PROCEEDINGS

A. Section 1094.5(b) is the Applicable Standard for Judicial Review of Adjudicative Administrative Proceedings.

The city expanded the traditional items covered in this SMA proceeding. When their conduct threatened the appropriation of a traffic servitude on adjoining property, the law imposed upon them to employ due process requirements which they failed to do. While also engaged in traffic control, they thereby again, imposed upon themselves the duties and limitations of the applicable law in connection with traffic regulations and that they be consistent with their general plan, etc.

Judicial review under Code of Civil Procedure section 1094.5(b) is the applicable standard for the courts review the adjudicative administrative proceeding conducted by the City herein, in connection with Fieldstone's application for the approval of their proposed subdivision plan. Neither the remedy nor Appellants standing have been questioned, nor well can they.

C.C.P. §1094.5(b) provides for in part:

> The inquiry in such case shall extend to the question whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discre-tion. Abuse of discretion is established if

respondent has not proceeded in the manner required by law....

There are four basic procedural requirements that must be alleged to state a good cause of action for a writ of mandate, and Appellants have alleged them. Namely, they are: no plain, speedy, and adequate remedy; Respondents have a present duty to act; Appellants have a clear, present, beneficial right to relief; and the exhaustion of administrative remedy to the degree possible.

Thus, the courts have been directed to search the administrative proceedings to determine if: they acted without or in excess of their jurisdiction, did they provided a "fair trial," and did they abuse their discretion by not following the law.

The depth of this search spans the total spectrum from "substantial" evidence rule, by supporting the decision with the use of the strict scrutiny rule, an independent judicial review as if in a trial de novo. In the case at bar, it is not subject to debate that Appellants have alleged the unconstitutional taking of their property and the deprivation of their human rights. Also, there cannot be any argument that these rights, as alleged in the Complaint, are "fundamental vested rights," and as such, demand the "strict scrutiny" test and then some, because the Appellants are part of a "suspect class." Adjoining property owners have not had the benefit of the equal protection of the law.

The adjudicative administrative proceedings in this case presents a clear case of a government agency going completely overboard. They have in their acts and omissions exceeded and acted without jurisdiction, the trial was not fair, nor a trial at all, and they violated the law across the board.

The record also makes it painfully apparent that Appellants were substantially and significantly deprived of their fundamental rights and that it had a vital impact on them as individuals as well as the class which they are part of.

The leading cases supporting these propositions are: Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal.3d 392, 395; Strumsky v. San Diego County Employees Retirement

Association (1974) 11 Cal.3d 28; and Bixby v. Pierno (1971) 4 Cal.3d 130, 143.

The case at bar shows no evidence to indicate that the trial court and court of appeal made any independent judicial review of the administrative proceeding that they were to examine with strict scrutiny.

B. The Facts Well Plead are "Admitted" Including the Exhibits.

Where, as in this case, the courts must make an independent judicial review, with strict scrutiny, the procedural device of a demurrer does not present law point exclusively as it does in the ordinary civil action. Sears Roebuck & Co. v. Walls (1960) 178 Cal.App.2d 284, 288.

In addition to all well-plead facts in the Complaint being admitted as true, it also assumes they are true and provable. The Complaint has also incorporated by reference unambiguous written documents of the City. There are three that merit particular attention, namely: (1) the City's Notice of Public Hearing, Exhibit "C" 2(J.A.:426); (2) the City's Agenda for the meeting, Exhibit "D" 2(J.A.:427); and (3) the City's Minutes of the meeting, Exhibit "E" 2(J.A.:429, 432).

Even without reading the Complaints herein and only spending one minute reading Respondents' own documents, Exhibits C, D and E, the following conclusions will be found to be supported by the facts in the record.

1. The City did not have, nor did it acquire, jurisdiction over Appellants or their property in the SMA proceeding.

2. The notice and the "hearing" in reality, a "town hall meeting" and attending and speaking at said meeting, do not meet the due process requirements of the Horn court.

The Horn court on page 617 says: "that the notice must at a minimum be reasonably calculated to protect their interest." On page 620, it concluded, "the notice received by the plaintiffs obviously led to no meaningful vindication of his due process rights."

The Agenda (Exhibit "D") entitled "Meeting" and not hearing or trial, shows on its face, that this was at best a "town

hall" type meeting (and one that was tightly controlled). The Horn opinion on page 619 states what they think about this type of "hearing": "The C.E.Q.A. procedures are intended only to make and record a public response limited to general environment aspects of a proposed project. In order to satisfy the due process requirements, it is necessary to have a hearing where specifications to the threatened interference with the property may be raised. "In a predeprivation hearing, it would be reasonable and necessary to have expert testimony from environmentalists as is the nature and extent of the impact and also a real estate expert appraiser to give their opinion as to the effect of this threatened interference on the market value of the property in question. The court is requested to note from page 5 of Exhibit "E" [2(J.A.:432)] the type of general opinion that was requested and permitted.

As the Horn case points out on page 617, "that this type of meeting cannot focus on the individual concerns of persons who are peculiarly and directly affected."

The court of appeal disposed of Appellants' Complaint for a writ of mandate on page 15 holding, "Thus, to the extent they have been deprived of a significant property interest, they received sufficient notice and opportunity to be heard." The court then went on to exasperate this startling conclusion by citing the Horn case. The Horn case is very much like the case at bar in all material respects. However, the evidentiary facts in the case at bar establish beyond a reasonable doubt that the process Appellants received was the antithesis of the due process criteria articulated by the Horn court.

The Horn court also puts to rest Respondents' often used argument that the "statute so provides" by saying at page 616 "... the due process requirement discussed herein are not rooted in the statute but are compelled by a stronger force of constitutional principle."

These and other putative defenses of the Respondents cannot be raised by a demurrer. They are affirmative defenses. Further, the City can no more deny their own documents any more than they can impeach their own witnesses. They ought to be estopped from offering "proof" that contradicts their own

documents. A pre-deprivation hearing requires nothing less than a judicial due process hearing.

In passing, their argument that the taking in this case is a private taking, is expressly refuted by Exhibit E, page 2 [2(J.A.:429)], wherein the City's employee testified that: "The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corté de la Vista." How can it be argued, (and successfully too?) that "traffic safety purposes" is not a public use and purpose on public streets and central to the governmental improvement.

How, indeed, can this whole judicial review proceeding be said to comply with the correct standard of the scope and depth that must be accorded to these proceedings. Not only did the administrative agency go astray, but the courts failed in their judicial review.

Not only does the City's employees testimony establish conclusively that the taking was for a public purpose (and admittedly for a laudable purpose) but is also establishes that the city did indeed, engage in the regulation of traffic. Appellants' complaints and exhibits establish, without being contradicted, that the City acted without and in excess of its jurisdiction by engaging in vehicular traffic control being expressly prohibited by the terms of the California Vehicle Code §21. Rumford v. City of Berkeley (1982) 31 Cal.3d 545. Only if the City could show by an affirmative defense that they acted within an express exemption in the statute, which they have not done nor can they.[4] The Complaint states that they failed to provide the appropriate notice and hearing, to provide a trial at all, and further abused their discretion by not following the law. This

---

4 California Vehicle Code §§21, 2100-21116 et seq. and §§22, 627, 21102, 21111, 22352 and 22357; Hutchinson v. City of Sacramento (1993) 17 Cal.App.4th 791, 794; Los Angeles v. So. Calif. Building & Loan Assn. (1961) 188 Cal.App.2d 850, 855. In addition to the notices and hearing required by the Traffic Code, the change in the traffic required an amendment.

was repeatedly called to the attention of the court and yet their judicial review failed to have them set aside the proceeding as being null and void. The courts, as well as Respondents, just completely ignored these and other like objections to the general plan. This also, in turn, requires notice and at least one more public hearing.[5]

Lastly, Government Code §66499.37, being a truncated, non self-executing, statute of limitations, that bars claims and therefore, notice of it must be given, and if not, it is unconstitutional on its face and as applied. In light of Tulsa v. Pope (1988) 485 U.S. 478, haw can the court of appeal say that this objection is "without merit"?

The standard of judicial review, explicitly codified by C.C.P. §1094.5(b) was either ignored or not correctly applied in this case.

III.

THE LOWER COURTS IN THIS CASE OWING TO A MISTAKE OF LAW AND MISREADING OF THE FACTS COMMITTED PREJUDICIAL ERROR IN REVIEWING THE GENERAL DEMURRER

A. Generally.

The recent case of Yee v. Auburn (1992) 3 Cal.App.4th 771, provides us with a current and clear statement of the law for the judicial review of a demurrer to a cause of action for inverse condemnation.[6]

B. Review of a Federal Cause of Action.

In Bach v. County of Butte (1983) 147 Cal.App.3d 554, the court also clearly and concisely sets forth the standard of review

---

5 Government Code §65353, §§65090-65092, 65354.5, 65355, 65318, 65919, 65357; 65858, 80 Opinion of Attorney General 310 (1983), 65862, 65303, and 65302(b). See also, Guardians of Turlock's Integrity v. Turlock City Council (1983) 149 Cal.App.3d 584, 592, 593; Friends of "B" Street v. Hayward (1980) 106 Cal.App.3d 988, 999; Save El Toro Assn. v. Days (1977) 74 Cal.App.3d 64, 72, 74.

6 Eldridge v. City of Palo Alto (1976) 57 Cal. App.3d 613, 632.

of an action based on federal statute or constitution. The state must look to federal law to determine what conduct gives rise to an action. The general rule is that state law controls in matters of practice and procedure; however, a "federal right cannot be defeated by the form of the local practice."

C. Federal Cause of Action Which is Based on Claim of Deprivation of Constitutional Rights Under Color of State Law Requires the Application of Federal Law.

Whereas in this case, the Complaint sets forth several causes of action based on section 1983 et seq. of the Federal Civil Rights Act and the Fifth and Fourteenth Amendments which are designed to serve as an antidote to discriminatory state laws, federal law shall be used to test their adequacy. In order to protect federal rights where state processes are available in theory, but not in practice, the application of federal law is mandatory.[7]

Where, as in this case, the Complaints set forth in Count I claims based on Appellants' state and federal constitutional rights that prevent the taking of their property without compensation; and where as in Count III, Appellants based on state and federal law and constitutions, claim the wrongful appropriation of their protected property rights and the deprivation of their human rights which denied them due process and equal protection of the law; and where as in Count IV, containing their Amended and Supplemental Complaints against the City for the deprivation of rights under color of state law [42 U.S.C. §§1883, 1985, 1986 and 1988]; and, lastly as in Count V, their complaint against Fieldstone for the same deprivation as aforesaid, the courts failed to exercise the judicial review required under the law for these type of violations of Appellants' constitutional rights 3(J.A.:542-560; 560-576).

While due process is not in all cases judicial process, where constitutionally protected rights are involved, judicial review must be exercised over administrative proceedings to insure that no citizen is deprived of their liberty, property or property

---

7 Williams v. Horvath (1976) 16 Cal.3d 834, 837, 841.

rights. It is a matter of common knowledge which the Court should take judicial notice, that Local administrative tribunals have become insensitive to the fact, that pressure from special interest groups is inconsistent with the proper function of their quasi-judicial capacity and function.

IV.

IF PROCEEDINGS, DECISIONS AND THE LAWS UPON WHICH THEY ARE BASED ARE VOID, FOR ANY REASON, THEY ARE SUBJECT TO BEING COLLATERALLY ATTACKED. IN SUCH CASES, THE STATUTE OF LIMITATIONS IS NOT A DEFENSE, LACHES MAY BE, NOT THE STATUTE OF LIMITATIONS AS A BAR, NEVER.

APPELLANTS' PETITION FOR REHEARING

At pages 23-27:

IV.

THE "NOTICE AND HEARING" GIVEN TO APPELLANTS IN RE: THE TENTATIVE MAP APPROVAL PROCEEDINGS ARE FATALLY CONSTITUTIONALLY FLAWED

From the hearing had and the one and only notice that Appellants received was ostensibly a public hearing, "town hall" type for the approval of Fieldstone's tentative map. The Appellants were not applicants or parties, but appeared as "witnesses" for the City's benefit to be better able to make an informed decision 2(398:10-26); 399; 400, 401:1-10).

The notice was defective 2(426, Exhibit C). Its only caveat: if you challenge the tentative map in Court, you may be limited to the issues raised. Note that it does not limit the issues you may raise in the proceedings relating to the final map approval or claim to be *res judicata*. To non-parties, this would also be so by operation of law 2(403:9-28; 404:1-19).

So far, not so bad. Now, and without further adieu, the Respondents argue that in the "town hall" type meeting, they have provided Appellants with a pre-deprivation hearing, a

hearing adopting new traffic regulations and a hearing to amend the General Plan, the Specific Plan and the Circulation Element. Further, the one notice for the public meeting satisfies the requirements for these three other hearings; and what's more, it satisfies the notice requirement necessary for the truncated statute of limitations to be constitutional. They argue that the one notice for the public meeting satisfies the requirements for these other four notices. Because in theory it is possible that one notice could, in fact, provide a person adequate notice to five or more purposes, we must turn to a copy of said notice 2(426, Exhibit C).

From its examination, it is palpably apparent that the notice is deficient for the following reasons:

(a) as for a notice for the public hearing as hereinabove set forth;

(b) as to the notice to regulate traffic, it fails to meet the requirements of the California Vehicle Code §§21, 21100 et seq. and/or the California Administrative Procedure Act, Government Code §1150(b);

(c) as for the notice required by Government Code §§65300 et seq. for amendments of the general plan;

(d) as for the notice for the predeprivation proceedings, the Horn case, infra, states on page 617, ...prior notice of a potentially adverse decision is constitutionally required, that notice must, at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interest. "It is submitted that Exhibit "C" is inadequate";

(e) as to the notice necessary to make a truncated statute of limitations that is a non claim, non self-executing statute, as in our case, and as such, requires actual notice of that fact to be given to Appellants, the notice is silent. Therefore, it does not satisfy the due process requirement. Tulsa v. Pope (1988) 485 U.S. 478, 491.[5]

---

[5] The Subdivision Map Act (S.M.A.), as well as the City's Code also requires notice in all other proceedings as to all parties except "contiguous property owners" with far less being at risk.

The above authority applied to the Complaint and Respondents' own documents 2(J.A. 426, 427, 428-437), do not permit any other conclusion than the notice and hearing totally failed to provide Appellants due process as constitutionally required. The proceedings and decisions relating to the approval proceedings of the tentative map are also unconstitutional and as such are null and void. Appellants cannot be barred by the statute of limitations upon this record. The acts and omissions of the City were without jurisdiction in the traffic management decision in the fundamental sense. The City was in excess and/or without jurisdiction because of the fatal flaws aforesaid in all the above-described proceedings, decisions and laws and therefore are null and void and not subject to the defense of statute of limitations (Appellants' Opening Brief at 18-26; Appellants' Reply Brief at 41-43).

The Court's opinion on page 15 erroneously concludes that "...they received sufficient notice and opportunity to be heard," citing the Horn case as authority. Under no circumstances, can the "notice and hearing" Appellants had, be said to meet the criteria set forth in Horn, for a constitutionally-sanctioned proceeding.

As to Appellants' objections to the traffic regulation adopted and approved by the City, the Court's opinion is silent.

On page 18 of the Court's opinion, footnote 6, the Court makes nodding reference to Appellants' objection relating to the unconstitutionality of the truncated statute of limitations. In light of the fact that the Supreme Court has recently so held in Tulsa v. Pope (1988) 485 U.S. 478, it would appear reasonable that the Court would explain their conclusion that Appellants' objection in this connection is "meritless."

Both the Code of Civil Procedure § 1094.6 and the City's Code expressly require special notice as required herein as applied to all other classes, except as to the rights of contiguous owners.

The Complaints (Second and Third Amended, and Amended and Supplemental) contain the facts to support these objections. The applicable law cited in Appellants' briefs and in

this Petition as applied to the facts in the Complaints, support Appellants' contentions.

For a more recent case applying the Horn Court's holding, see Selinger v. Redlands (1989) 216 Cal.App.3d 259. For a contemporaneous decision relating to "pre-seizure" due process requirements, being analogous to "property pre-deprivation proceedings," see. U.S. v. Daniels (Dec. 18, 1993) 126 L.Ed.2d 490.

Appellants earnestly believe that the Respondents' "speaking" demurrer misled this Court into making errors in the applicable law and misunderstood the facts in Appellants' Complaint and inadvertently relied on Respondents' scenario of the facts.

V.

THE PROCEEDINGS FOR THE APPROVAL OF THE FINAL MAP BASED ON THE ADMITTED FACTS ALLEGED IN THE COMPLAINT AND THE UNAMBIGUOUS LAW RESULT IN THE CONCLUSION THAT SAID PROCEEDINGS OUGHT TO HAVE BEEN ADJUDICATORY

Preliminarily to determining the type of hearings requiring "due process" protection, our Supreme Court examined in detail the rationale of the "legislative-adjudicatory" distinction in its landmark decision of Horn v. County of Ventura (1979) 24 Cal.3d 605 (Horn) and concluded on page 615:

> In therefore rejecting the concept that subdivision approvals are purely 'ministerial' acts requiring no precedent notice or opportunity for a hearing, we thereupon proceed to consider defendants and real party's secondary arguments.

In the Court's analyses, starting on page 612, nowhere do they make a distinction between temporary or final subdivision approvals, or such other labels. The four pages devoted to this

subject demonstrate that it is necessary to examine each case on an individual basis to make this decision. It is clear that on the facts in Appellant's Complaint, the Horn Court would hold that the proceeding to approve the final map was adjudicatory in nature and therefore is subject to procedural due process protection.

The City, in approving the final subdivision map, must comply with all the requirements of the Subdivision Map Act, and in particular, Government Code §§66458, 66473, 66473.5 and 66474.

To believe that Government Code §66474.1 overruled all the provisions of the Subdivision Map Act, particularly the chapters dealing with the procedures and requirements for approval proceeding of the final map is incredulous. It is true that it is ambiguous but rules of statutory construction ought to permit a reasonable interpretation that would give effect to the whole Subdivision Map Act. It would be reasonable to assume that in labyrinth legislative process it became convoluted. It would also be a reasonable interpretation that it was the legislative intent to permit a final approval of the tentative map if it complied with the requirements that were applicable at the time of the tentative map and that a modest modification of the tentative map to the final map shall not be grounds for its disapproval if they are substantially the same.

In our case, it is clear that neither the tentative or final map complied with the requirements of the Subdivision Map Act. The tentative map is not entitled to *res adjudicata* principles against parties, much less witnesses. Youngblood v. Board of Supervisors (1978) 27 Cal.App.3d 644 is no authority to support the Court's ruling. This case stands for no more than the clause that is liberally sprinkled in among the provisions to the Subdivision Map Act: "that it complies to the requirements that were applicable at the time of the approval of the tentative map."

By applying the provisions of the Subdivision Map Act and the City's Subdivision Ordinance, Title 20 of Carlsbad Municipal Code to the facts alleged in the Complaint and its exhibits, it is clear that by following the template of the analyses

that the Horn Court provided us, the proceeding in the case at bar approving the final map had to be an adjudicatory proceeding and subject to procedural due process principles. It necessarily follows that the Appellants sought judicial review by a proper remedy and in a timely manner. Based on the cited law, applied to the facts in the record, Appellants claim that they were deprived of their property, due process and equal protection of the law rights.

It should also be apparent to the Court that both the proceedings and the decision approving the final map to the subdivision are null and void. Thus, Appellants would be permitted to challenge same collaterally, if necessary. From these conclusions, it must also be apparent that defense of the statute of limitations is a "red herring."

From the above, it can be stated that a legislative body (City Council) acting as an administrative hearing tribunal in a subdivision land zoning proceedings is an "adjudicative function." In the Court's opinion on page 15, it was error to find that in this case it was non-discretionary and therefore deny Appellants their property and civil rights.

It was also error for the Court to hold that §66474.1 of the Government Code, effectively made proceedings and decisions "non-discretionary."

In the Court's opinion on page 14, it states, "...we presume the City was required to approve the final map"; this was in error. On the record in this case and the applicable law applied to it, it cannot be presumed that the City was required to approve the final map because the Complaint did not allege that: "the final map was not in substantial compliance with the tentative map." Also, it is an affirmative defense that cannot be established by a demurrer. Attention is respectfully called to the Subdivision Map Act, Title 7, Chapter 3 (Procedures) and Chapter 4 (Requirements).

On page 14 of the Court's opinion it again states in part:

> As the masses contend the harm caused them arises out of the relocation of the access gate as a condition to approval of the tentative map, the crux of their claim is wrongful approval of the tentative map and not the final map.

This statement in form and in substance is in error because it mistakes the law and misunderstands the facts. The facts as alleged in the Complaints do not only not say this, they explicitly state otherwise. Upon close examination, it will be found that the source of the Court's error was relying on Respondents' scenario of the facts and not the Appellants' Complaints.

The relocation of the gate may be shorthand to identify the means used by the City to achieve public safety, however, a full and proper reading of the Complaints show otherwise. If the Complaints were given "a reasonable interpretation, reading it as a whole and its parts in context," it is impossible to arrive at the Court's conclusion. By doing so, it will be found that the crux of Appellants' claim is the injuries caused by the traffic and <u>not</u> the gate.

Because of the above-identified errors and omissions, Appellants have been prejudiced and solicitously request that a rehearing be granted and the Court order the City to set aside its decision.

At pages 19-22:

D. THE TENTATIVE MAP PROCEEDINGS WERE NULL AND THUS CAN BE COLLATERALLY ATTACKED.

1. The factual basis for this conclusion can be supported by reference to the Joint Appendix[9] [footnote omitted in printing]:

Subject	Citation
"Plaintiffs are citizens of the United States..."	2(J.A. 395:6)
"The City is a public entity..." and as such, is a person under the civil rights law.	2(J.A. 396:4,5)
The City acted under color of state law.	2(J.A. 397:10-17)
The Public Hearing was a sham.	2(J.A. 399:10-22)
One-sided hearing.	2(J.A. 400:19-25)
The notice to the multi-faceted hearing was defective; neither the hearing or the notice conform to the standards of the "due process" clause of the Federal or State constitutions.	2(J.A. 404:20-24)
Appellants were deprived of their Federal "due process" and "equal protect" rights under the Federal Constitution.	2(J.A. 404:25-28; 405:1-26)

9 Footnote omitted in printing.

Appellants did not receive reasonable notice or opportunity to be heard prior to the deprivation of its property rights and in violation of its civil rights.	2(J.A. 408:21-24)
Appellants' property and civil rights were denied them in violation of the City's duty.	2(J.A. 411:3-12)
The violations of Appellants' rights were caused by the City's acts and omissions under color of law and in violation of their constitutional rights.	2(J.A. 412-414:1-18) and 1(J.A. 415:4-21)
The City acted under color of state law and violated Appellants' rights as aforesaid causing Appellants damages and said acts are not isolated.	2(J.A. 416:7-28; 417, 418:6-26)
Appellants' right to possession and use of their property is based upon the positive law of California (see Appellants' Reply Brief 13-17) and provides the substantive bases for its claim under the civil rights remedies law.	2(J.A. 411:10-12; 412-415:1-21)
Requirements for approval of the final map, makes it clear that the proceedings are adjudicative in nature.	2(J.A. 408-409:1-20)
Appellants were not parties to the proceedings between the Respondents.	2(J.A. 409:26-28)
The decision to divert traffic was in excess of the City's jurisdiction, counter-productive and inconsistent with the general, special and circulation plan.	2(J.A. 410:17-28, 411)
The City's diversion and funneling the traffic of the 132 project denied Appellants of their civil and property rights.	2(J.A. 415-418:1-18)

The City notice and agenda are prima facie evidence that the notice and hearing did not meet constitutional "due process" and "equal protection" standards.	2(J.A. 426-427)
Tentative map approval was conditional and subject to the requirements of the final map, both of which items required "discretion."	2(J.A. 400:26-28, 401:1-7)
The City ordinance made it mandatory for them to provide a notice and hearing where you "shall be heard" and "discretion" shall be used.	2(J.A. 397:23-27); 2(J.A. 398:1-13)
DESCRIPTION OF THE HEARING	2(J.A. 399-407:1-10)

2. The notice and hearing that were had did not comply with the due process requirements of the constitutions.

3. The nature and extent of the proceedings were such that Appellants, under the law, were entitled to at least four more notices and three more hearings.

4. *Vehicle Code* §§21, 21000 et seq. require a notice and hearing for a traffic regulation proceeding.

5. *Government Code* §§65300 et seq. require a notice and hearing for amendments to the General Plan, Specific Plan, and the Traffic Circulation Plan, which was necessary because the traffic regulation adopted Is in conflict with them all.

6. A Horn-type predeprivation hearing is mandatory in this case. The "town hall" type meeting cannot be claimed to meet those standards or any of them.

7. A notice of the truncated statute of limitations is mandatory in order to meet constitutional standards of due process.

8. Contiguous homeowners that have claims resulting from new subdivisions are discriminated against and do not receive the equal protection of the law that they are entitled to in the SMA, City subdivision ordinance, C.C.P. §§1094.5 and 1094.6.

9. In addition to giving rise to a cause of action for the deprivation of their civil ris, for a writ of mandate for taking, it also gives rise to a cause of action for a due process taking.

10. Importantly, it also permits Appellants to collaterally attack the proceeding approving the tentative map because they are unconstitutional and null and void.

Authorities in support of this heading and subheadings have been grouped together here for the Court's convenience[10].

E. PROCEEDINGS FOR APPROVAL OF THE FINAL MAP OUGHT TO HAVE BEEN ADJUDICATORY.

1. The tentative map approval was conditional and the requirements of SMA and the City's related subdivision ordinance both make it mandatory that an adjudicatory hearing be had; Chapter 3, §§66451-66472.1 Procedures and Chapter 4, §§66473-66498 Requirements of the SMA.

2. Conditional, tentative map approval where the conditions remain unfulfilled or require judgment to determine if they have been fulfilled, approval of the final subdivision map is not a ministerial act.

3. *Government Code* §§66458, 66473, 66473.5, 66474, among others, all make it mandatory that a tentative map be disapproved.

4. Respondents claim and the court agreed, that the final map proceedings were ministerial, based on *Government Code* §§66474.1 and the Youngblood case is erroneous.

5. The subsection in question is ambiguous. It can only reasonably be interpreted to mean that the final map should be approved if it complies with all the requirements in force at the time of its approval. This is all the Youngblood case holds.

6. The startling proposition that this subsection makes it mandatory for the City to approve the tentative map, in this case, cannot be substantiated by the law, facts or reason. It cannot be said the it repealed the procedures and requirements of the SMA 2(J.A. 401: 26-28; 402: 1-19; 405: 22-26; 408; 409: 21-25).

---

10 Footnote omitted in printing.

7. The Horn court would not find that these proceedings were ministerial.

8. The proceedings approving the final map are clearly adjudicative. That being the case, the Appellants filed for judicial review in a timely manner. Again, the statute of limitations defense is inapplicable 2(J.A. 408: 25-28).

V. INDEMNITY, IMMUNITY AND INTENTION

APPELLANTS' PETITION FOR REHEARING

At pages 36-40:

VIII.

REASONABLE NOTICE IS THE CORNERSTONE OF DUE PROCESS "Intention-Indemnification"

There is consensus among the commentators and the Courts that "notice" is the essence and the *sine qua non* of due process. It is indisputable that Appellants did not receive reasonable and adequate notice. For Respondents to argue that Appellants received such notice because Appellants received and responded to the "Notice of Public Hearing" is disingenuous at best. It proved to be worse then no notice, because it was false and misleading.

Due to an honest error on the part of Appellants, Government Code §66451.4 was cited three times in their Reply Brief. Within a few days after filing said brief, it was discovered that said statute had been repealed. Within eleven (11) days of filing said brief, the Court was notified in writing (in Appellants Request for Oral Argument) of this oversight. Appellants apologize if this has caused the Court any inconvenience. It is not believed anyone was prejudiced by Appellants' oversight.

Prior to its repeal, said statute provided for in words and figures as follows:

> **§ 66451.4. Notice of application to owners within 300 feet**
>
> (a) In addition to the notice required by Section 66451.3, whenever approval of a tentative map will

> constitute a substantial or significant deprivation of the property rights of other landowners, the local agency shall provide notice of the application to all persons, including businesses, corporations, or other public or private entities, shown on the last equalized assessment roll, as owning real property within 300 feet of the property which is the subject of the application.
>
> . . . .
>
> (c) Nothing contained in this section shall preclude a local agency from providing additional notice by other means, not shall the requirements of this section preclude the local agency from providing the necessary notice at the same time and in the same manner as public notice otherwise required by law for such project. (Added by Stats. 1980, c.1154, p. 3808, §1, eff. Sept. 26, 1980.) (Emphasis added.)

By virtue of the date of this statute, when it was adopted and its language, it is reasonable to assume that it was the legislature's intent to codify the holding of the Horn Court, infra. Of greater significance to our case is, what was the legislative intent in repealing said statute two years later? To answer this question, research was initiated by Appellants and the services of "Legislative Intent Service"[5] (LIS) was sought. By examination of legislative documents which were generated before, during and after the bill in question moved through the legislative process, it was the conclusion of the LIS and Appellants, that based on the examination of said documents, the following is true: that the California Chapter of the American Planning Association (APA) was the prime mover of the repeal of Section 66451.4 of the Subdivision Map Act on the grounds that said section was redundant, duplicative and inconsistent. That said APA was supported by the California Chapter of the American Planning Association, the California

---

5 Footnote omitted in printing.

Association of Realtors and the California Building Industry Association, also known as the BIA.

The reason advanced by these special interest associations, to urge the legislature to repeal this notice provision, were and are false on the face of the Subdivision Map Act.

The fact that this statute was repealed does not affect the merits of our case. It's repeal is not a constitutional amendment nor did it overrule the Supreme Court. The "taking" clause and the "due process" clause still stand as does the Horn case.

The issue of notice legislation is related to the issue of indemnification because of the inextricable and close relationship between the developer and the City in land regulation matters. In examining the City's requirement under the Subdivision Map Act, for approval of a developer's final map, we noted that Government Code §66474, requires that the City must deny approval if certain enumeration criteria are not met. The same section under subsection §66474.9 provides for an exception to the general rule that the City cannot require as a condition for the approval of a map of the developer, to defend, indemnify or hold the City harmless for its conduct in the approval or disapproval proceeding. The general rule is designed to prevent the City from shifting its financial responsibility for its errors and omissions to the developer who has most to gain from these oversights. The City exists for and as a representative of its citizens. Because of its very close relationship with the developer, conventional wisdom is that the general rule will prevent or reduce the risk of collusion, corruption and conduct that is detrimental to the citizen's confidence in fair and equal enforcement of state and federal laws. In 1986, the legislature, for reasons not apparent in the legislation itself, provided the developers an exception to the general rule of prohibiting the developers from indemnifying the City (perhaps the legislative intent could be determined by searching for clues among the "paper trail" for the legislative process). The exception that the legislature gave to the developer did however contain two qualifications, one explicit and the other implicit. The explicit qualification to approval of an indemnity agreement between developer and the City is

contained in subsection (b)(1) and provides, in substance, that the action must be one which ". . . is brought within the time period provided for in Section 66499.37."

The implicit qualification is that the indemnification can only apply to misfeasance, not malfeasance. The Appellants raised this issue in their brief because it was apparent that there existed in this case an indemnification agreement between the City and Fieldstone, which was corroborated by Fieldstone's lawyer, also representing the City. Appellants dismissed the idea of a conflict of interest on the stated reason that Richard A. Schulman was with a respectable firm and would not knowingly engage in any unethical or illegal conduct.

Because of the Respondents' insistence that Appellants' claim was not filed within the time period provided for in Section 66499.37 and further because now it clearly appears that the acts of the City were wrongful acts without any legal right (malfeasance) and that Fieldstone cannot legally indemnify the City because it is not only unethical, but illegal.

That Courts are not to sit as super legislatures to debate and determine the wisdom, desirability or propriety of statutes like the exemption to the general prohibition of indemnification of cities by developers. However, when that statute is interpreted as permitting acts by the city that are without or in excess of their jurisdiction or malfeasance, then that statute must be repealed on the grounds that it contravenes a strong public policy. Accordingly, if such construction is adopted, this Court should strike it down. On the other hand, if this Court strictly construes the statute, as it should being in derogation of the common law, it should hold the indemnifi-cation agreement between the Respondents, invalid as not falling within the exemptions and, is also against public policy. In either event, the Respondents cannot legally or even ethically be represented by the same attorneys. This is based on the strong public policy of minimizing the cities from being influenced by corruption.

Based on the facts in the Complaint (close relations and nature of the City's conduct) and the record as a whole, the Respondents cannot have an indemnification agreement between them or be represented by the same attorneys. Topanga

Association v. County of Los Angeles (1989) 214 Cal.App.3d 1348.

PETITION FOR REVIEW OF DECISION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT [DIVISION ONE] FILED JUNE 17, 1994

At pages 16-17:

B. THE GOVERNMENT IMMUNITY IN CIVIL CODE §3482 IS NOT APPLICABLE TO FIELDSTONE'S BREACH OF DUTY TO APPELLANTS AS ALLEGED IN COUNT II.

1. Case law uniformly hold that the immunity only applied, if at all, to governmental agents and other entities in privity with them.

2. The cases are also unanimous, that if a statute is applicable, it is limited to "reasonable" nuisances, both in the manner caused and the nature of the injury inflicted.

3. In any event, the government cannot claim the immunity if conduct effected a taking of private property without compensation. It would be unconstitutional.

4. If the government cannot claim the statutory immunity, it cannot be claimed by non-governmental agencies, even if they were in privity. Derivative immunity right cannot be greater than its origin.

Authorities in support of this heading and subheadings are grouped together here for the Court's convenience[5].

---

5 Orpheus Building Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal.App.3d 863; Greater Westchester HOA, infra; Hassell v. San Francisco (1938) 11 Cal.2d 170, 171 ("particularized inquiry into each statute").

APPELLANTS' REQUEST FOR ORAL ARGUMENT

In compliance with the Court's request, the appellants and each of them do hereby respectfully request that this case be placed on the calendar for oral argument. They believe that oral argument will materially add to what is now before the court for the following reasons:

1. Government Code §66451.4 provided for notice to adjacent landowners whenever the approval of a tentative map will constitute a substantial or significant deprivation of their property rights. Added by Stats 1980, Ch 1151 §2, ch 1154 §1 effective September 29, 1980;

2. From its language and its timing it appears to be in direct compliance with the holding in Horn v. Ventura County, 24 Cal.3d 605 (1979);

3. Because legislative history of a bill is frequently revealing as to the legislative intent, appellants', subsequent to the filing of their Reply Brief, initiated research to that end;

4. The best source, and at times the only source, of legislative history is located in Sacramento. Research to date has only revealed that said section was repealed by Stats 1984 Ch 1009 §31;

5. Because the results of full research as to both the adoption and the repeal of this section may add materially to what is presently before the court, this is one of the reasons oral argument is being requested.

6. In the administration of justice, no better way has been devised to determine the truth than the adversarial system;

7. The respondents have failed to join issues based on the facts alleged in the complaints and the issues presented in Appellants' Brief;

8. Only toe to toe confrontation between the parties on the issues, determined by the Court's questions, can accomplish this in the current state of the record now before this Court, and is the second reason to request oral argument;

9. Lastly, oral argument would also afford the appellants the opportunity to emphasize the values of properly

designed and correctly applied constitutionally sanctioned predeprivation proceedings to all parties concerned;

10. The predeprivation proceeding would be much less expensive, vexatious and wasteful of valuable resources than this type of litigation, plus, be much more expeditious: and

11. This type of litigation unnecessarily and unfairly increases the already high cost of housing; and

12. It would encourage better community relationship; and fuller participation in government; and

13. Such proceeding would have a salutary effect on the land developers, land planners, "The City," the judicial system and the public; and

14. The proceeding would at the same time protect affected landowners of their Federal and State Constitutional, statutory, and case law, guaranteed rights.

If "Appellants' Request For Oral Araument" is granted, the allotted 15 minutes would be divided equally between opening and closing argument, and subject to the Court's discretion.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At pages 23-25:

G. HOMEOWNERS DIRECTLY INJURED BY A NEW SUBDIVISION CONSTITUTE A "SUSPECT" CLASS AND NEED PROTECTION OF THE JUDICIARY.

1. These homeowners are not an organized group and their demographics makes it unlikely that they could be organized. They have no special clout with the state legislature or their local government.

2. The developers are highly organized and well represented in the state legislature[12].

3. Their organizations were the prime movers in causing the repeal of *Government Code* §66451.4, which had codified the Horn due process notice requirements on the false grounds that it was duplicative.

4. The developers also appear to have been responsible for any number of provisions in the SMA that are favorable to the building industry. The provision "liberalizing" the law by permitting them to indemnify the governmental agency from liability associated with land regulation and zoning is a good example.

5. The statute, even as amended, is being violated by the Respondents. Fieldstone, by indemnifying the City and allowing their attorney to also represent them, is not only unethical, but in violation of the law in the following ways.

a. Under no circumstances is indemnification permitted if malfeasance is involved as charged in this case;

b. Under Respondents' theory of the case, the claim was not filed within 90 days, and thus not within the exemption of the general law;

c. Indemnification agreements cannot extend to inverse condemnation damages.

In further support of Appellants' contentions that they are members of a class that has received unequal protection, they set forth the applicable authorities and facts for the Court's convenience[13].

---

12 Footnote omitted in printing.

13 Footnote omitted in printing.

VI. CONFLICTS

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At pages 19-22:

D. THE TENTATIVE MAP PROCEEDINGS WERE NULL AND THUS CAN BE COLLATERALLY ATTACKED.

For the factual basis and reference to the Joint Appendix, see Part Three, Section IV of this Appendix, at page 129, supra.

E. PROCEEDINGS FOR APPROVAL OF THE FINAL MAP OUGHT TO HAVE BEEN ADJUDICATORY.

For the factual basis and reference to the Joint Appendix, see Part Three, Section IV of this Appendix, at page132, supra.

VII. FACTS AND ISSUES

PETITION FOR REVIEW OF DECISION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT [DIVISION ONE] FILED JUNE 17, 1994

At pages 23-25:

F. ASSUMING, *ARGUENDO*, THAT THE PROCEEDING, DECISIONS AND LAWS ARE SUBJECT TO THE STATUTE OF LIMITATIONS DEFENSE, THE APPELLANTS HAVE RAISED NUMEROUS REASONS, ANY ONE OF WHICH WILL BAR ITS USE.

1. Without waiving the other "bars" to the statute of limitations defense, the Appellants call the Court's attention to Pierpont, infra. The material facts and issues are the same as in the case at bar, and the doctrine of "judicial suspension" being based on good logic and reason, the case is dispositive of the putative defense of the statute of limitations[11].

---

[11] Preliminarily to determining the type of hearings requiring "due process" protection, our Supreme Court examined in detail the rationale of the "legislative-adjudicatory" distinction in its landmark decision of Horn v. County of Ventura (1979) 24 Cal.3d 605 (Horn) and concluded on page 615:

> In therefore rejecting the concept that subdivision approvals are purely 'ministerial' acts requiring no precedent notice or opportunity for a hearing, we thereupon proceed to consider defendants and real party's secondary arguments.

In the Court's analyses, starting on page 612, nowhere do they make a distinction between temporary or final subdivision approvals, or such other labels. The four pages devoted to this subject demonstrate that it is

2. The Nestle case, infra, had earlier held "that every repetition of the wrong may create further liability," thereby indicating that in continuing injury cases that statute of limitations may never be a defense so long as they are continuing.

G. HOMEOWNERS DIRECTLY INJURED BY A NEW SUBDIVISION CONSTITUTE A "SUSPECT" CLASS AND NEED PROTECTION OF THE JUDICIARY.

1. These homeowners are not an organized group and their demographics makes it unlikely that they could be organized. They have no special clout with the state legislature or their local government.

2. The developers are highly organized and well represented in the state legislature[12].

3. Their organizations were the prime movers in causing the repeal of *Government Code* §66451.4, which had codified the Horn due process notice requirements on the false grounds that it was duplicative.

4. The developers also appear to have been responsible for any number of provisions in the SMA that are favorable to the building industry. The provision "liberalizing" the law by permitting them to indemnify the governmental agency from liability associated with land regulation and zoning is a good example.

5. The statute, even as amended, is being violated by the Respondents. Fieldstone, by indemnifying the City and allowing their attorney to also represent them, is not only unethical, but in violation of the law in the following ways.

---

necessary to examine each case on an individual basis to make this decision. It is clear that on the facts in Appellant's Complaint, the Horn Court would hold that the proceeding to approve the final map was adjudicatory in nature and therefore is subject to procedural due process protection.

12 Their lobbyists need no introduction. The political action committee has already attended to this formality.

a. Under no circumstances is indemnification permitted if malfeasance is involved as charged in this case;

b. Under Respondents' theory of the case, the claim was not filed within 90 days, and thus not within the exemption of the general law;

c. Indemnification agreements cannot extend to inverse condemnation damages.

In further support of Appellants' contentions that they are members of a class that has received unequal protection, they set forth the applicable authorities and facts for the Court's convenience[13].

---

13 From documents that were used in the legislative process, it is clear that the developers were directly responsible for the repeal of *Government Code* §66451.4, which provided for the constitutionally sanctioned proceeding articulated by the Horn court and the "liberalization" of indemnification agreement between them and governmental agencies. Topanga Association v. County of Los Angeles (1989) Cal.App. 1348; Greater Westchester HOA, infra (indemnification agreements between City and their privy in land regulation matters cannot extend to damages in inverse condemnation).

The close relationship between Fieldstone and the City has been alleged in the Complaints. The following examples support Appellants' case. 2(J.A. 399:6-10, 400:19-25, 402:20-28, 416:25-28;, 417) and 3(J.A. 549:3-7, 561:1-11, 570:8-11, 19-22).

VIII. AMENDED AND SUPPLEMENTAL COMPLAINT

APPELLANTS' OPENING BRIEF

At pages 47-49:

F. THE COURT'S ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE THE AMENDED AND SUPPLEMENTAL COMPLAINT WAS A PREJUDICIAL ABUSE OF DISCRETION WHERE THE RECORD SHOWS CLEARLY THAT §§464, 373 AND 576 OF THE CODE OF CIVIL PROCEDURE PERMIT SUCH FILINGS.

Page limitations prevent plaintiffs-appellants from developing this argument in full. Of necessity, the following outline consisting of headings will have to suffice.

1. That the plaintiffs in good faith filed their amended and supplemental complaint without leave of court based upon a mistake of fact that the trial court had stated that leave of court was not necessary to file an amended complaint based on a new theory of recovery (J.A. 496: 10-23).

2. But for plaintiffs' mistake, they would have attempted to obtain leave of court to file said amended and supplemental complaint, and if granted, said complaint would have been pending and undisposed of on the merits when the trial court ruled that plaintiffs' action be dismissed. Under those circumstances, the court by applying the principles of law that require "all issues on the merits be resolved" and that there be but "one final order," would not have dismissed the action without first disposing of the issues of law on the merits of said amended and supplemental complaint.

3. C.C.P. §472 - may amend any pleading, once of course, before answer or even after demurrer if before the trial of the issue of law thereon. C.C.P. §4 - ". . . The code . . . And

its provisions and all proceeding under it are to be liberally construed . . . To promote justice." C.C.P. §576 - the court may allow an amendment at any time "in the furtherance of justice." The court's power to amend is to be liberally exercised so that the cases may be decided on the merits.

4. The plaintiffs-appellants exercised due diligence in filing motion for relief and there has been no prejudice to the defendants-appellees and none even alleged (J.A. 535: 5-7; 578: 1-11).

5. On October 15, 1992 the trial court ruled on its own motion to strike plaintiffs' amended and supplemental complaint on the grounds that it was filed without leave of court (J.A. 640). In the same ruling it also denied defendants' request for sanctions against the plaintiffs for filing said complaint without leave of court. Implicit in said ruling is that plaintiffs were in good faith and without any improper motive, and accordingly should be granted the right to file, etc.

6. In any event because said complaint presents a novel question it should be allowed to be filed (J.A. 542-576).

The factual bases and the legal foundation for the above propositions can be found on the following pages of the Joint Appendix: (532; 533; and 534: 1-7) (471; 494) (528, 530) (532, 542, 577). This is provided for the Court's convenience only if it chooses to examine them and is not meant to be an "invitation," incorporation by reference, or any other form of impropriety or imposition.

IX. CONSTITUTION OF THE UNITED STATES IS THE SUPREME LAW OF THE LAND

APPELLANTS' PETITION FOR REHEARING

At pages 41-43:

IX.

RESPONDENTS ARGUE IN FAVOR OF A STRONG POLICY OF STRICT ENFORCEMENT OF THE STATUTE OF LIMITATIONS AND IN FAVOR OF FREE ENTERPRISE. IN THIS, THE PARTIES CONCUR. HOWEVER,"THE ARGUMENT IGNORES THE ESSENCE OF PLAINTIFF'S COMPLAINT, WHICH IS THAT THESE VERY PROCEDURES WERE CONSTITUTIONALLY INADEQUATE." (HORN 611)

Not all rights are equal. There are normative standards, statutory law rights, common law rights and constitutional rights. Constitutional rights are our fundamental rights and the pinnacle in our hierarchy of laws. Not even, all constitutional rights are the same. The rights to protect our life, liberty and property from the inherent excesses of our governments is the apogee of the constellation of the rights of citizens to protect themselves against their government's action. The constitutions are not just parchment relics enshrined in a glass case for display in archives. Nor are they just to be used for inspirational Fourth of July speeches. They are working weapons against the tyranny of the majority, the government. The judicial policy doctrines of "abstention," of constitutional issues, if a case can be decided on a non-constitutional basis, cannot be used by the Court to ignore a citizen's complaints of abuse and deprivation by their government.

The recent case of Healing v. California Coastal Commission (1994) 22 Cal.App.4th 1158, the Court stated:

> It is the nature of our work that we see many virtuoso performances in the theater of bureaucracy but we confess a sort of perverse admiration for the commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment on Healing's mandate petition. To state the Coast Commission's position is to demonstrate its absurdity."

Healing's "long-term nightmare" bares close resemblance to the abuses and deprivation that the Respondents are doing to the Appellants. It is straight out of Kafka.

These type of excesses are not new. In 1742, Montesquieu said:

> "There is no crueler tyranny than that which is perpetrated under the shield of law and in the name of justice."

Our founding fathers, who were students of other Great Books were well aware of the dangers of the assumed power of government and the need to provide protection to "We the People." Injustices like these have a coercive and destructive effect on the delicate fabric of our society. The respect the law deserves and which the people want to give it, has been in steep decline in recent years. Only two weeks ago last Friday, we had displayed on our television screens the spectacle of a known "fugitive of the law," being pursued by the police, and hundreds of thousands of citizens, who lined the freeways encouraging him to escape the law, of which they obviously have no respect for, with cheers of "go O.J., go." Not a pretty picture.

It is not a condition that will go away soon. It happened in increments of injustice. It will only be corrected by doing justice to the citizens, to regain their respect for the law. It can still be regained, but not overnight. It must be earned by example of citizens being able to fight City Hall successfully with a certain and speedy remedy for real abuses and deprivation of their civil and property rights.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At page 25:

H. THE CONSTITUTIONS ARE THE SUPREME LAW OF THE LAND!

1. The supremacy of the federal Constitution is acknowledged and confirmed by the California Constitution in Article III, §1.

2. The Horn case, infra, at page 616 states:

> ...[T]hat the due process requirements discussed herein are not rooted in statute but are compelled by the stronger force of constitutional principle.

The argument relating to the merits has been limited merely to demonstrate that there exists a fair probability that they will be sustained if review is granted. The argument was not made as a reason for review, but only as assurance that if review is granted, it will not be a mere academic exercise.